Docket for 03-1230

(20)

No. 03-1230
Vide 03-1234
Title: American Trucking Associations, Inc. and USF Holland, Inc., Petitioners
v.
Michigan Public Service Commission, et al.
Docketed: March 1, 2004
Lower Ct: Court of Appeals of Michigan
Case Nos.: (226052, 226122, 226053, 226137)
Decision Date: March 11, 2003
Discretionary Court
Decision Date: December 3, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Mar 1 2004	Petition for a writ of certiorari filed. (Response due March 31, 2004)
Mar 18 2004	Order extending time to file response to petition to and including April 30, 2004.
Apr 30 2004	Motion for leave to file amicus brief filed by Chamber of Commerce of the United States.
Apr 30 2004	Motion for leave to file amici brief filed by National Private Truck Council, et al.
Apr 30 2004	Brief of respondents Michigan Public Service Commission, et al. in opposition filed.
May 10 2004	Reply of petitioners American Trucking Associations, Inc. and USF Holland, Inc. filed.
May 18 2004	DISTRIBUTED for Conference of June 3, 2004.
Jun 7 2004	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Aug 24 2004	Supplemental brief of petitioners American Trucking Associations, Inc. and USF Holland, Inc. filed.
Dec 17 2004	Brief amicus curiae of United States filed. VIDED.
Dec 29 2004	DISTRIBUTED for Conference of January 14, 2005.
Jan 5 2005	Supplemental brief of respondents Michigan Public Service Commission, et al. filed. VIDED. (Distributed)
Jan 14 2005	Motion for leave to file amicus brief filed by Chamber of Commerce of the United States GRANTED.
Jan 14 2005	Motion for leave to file amicus brief filed by National Private Truck Council, et al. GRANTED.
Jan 14 2005	Petition GRANTED limited to the following question: Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.
Jan 21 2005	The orders granting the petitions for writs of certiorari are amended to read as follows: The petitions for writs of certiorari are granted limited to the following questions: 1) "Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution." 2) "Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U.S.C. §14504." The cases are consolidated and a total of one hour is allotted for oral argument. (See 03-1234)
Feb 1 2005	Response to petitioners' motion to deconsolidate the cases. VIDED.
Feb 1 2005	Motion to deconsolidate the cases or, in the alternative, enlargement of time for oral argument and for divided argument. filed by petitioners. VIDED.
Feb 21 2005	Joint appendix filed. VIDED.

Feb 22 2005	SET FOR ARGUMENT ON Tuesday, April 26, 2005.
Feb 25 2005	Brief of petitioners Mid-Con Freight Systems, Inc., et al. filed. VIDED.
Feb 25 2005	Brief amici curiae of Deeco Services, Inc., et al. filed.
Feb 28 2005	Brief amicus curiae of Chamber of Commerce of the United States filed.
Feb 28 2005	Brief of petitioners American Trucking Associations, Inc. and USF Holland, Inc. filed.
Feb 28 2005	Brief amicus curiae of Eagle Forum Education and Legal Defense Fund filed.
Mar 9 2005	Letter filed by petitioners' to supplement their motion for divided argument (VIDED).
Mar 15 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Mar 16 2005	Joint response by petitioners to the motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument. VIDED
Mar 16 2005	Record received from Court of Appeals of Michigan. (1 box)
Mar 25 2005	CIRCULATED.
Apr 4 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. VIDED.
Apr 4 2005	The motion to deconsolidate the cases or in the alternative to enlarge the time is Denied. The motion for divided argument is Granted to be divided as follows: 15 minutes for petitioners in 03-1230; 10 minutes for petitioners in 03-1234; 25 minutes for respondents; and 10 minutes for United States. VIDED.
Apr 4 2005	Brief amici curiae of United States in support of respondents filed. (Distributed).
Apr 4 2005	Brief of respondents Michigan Public Service Commission, et al. filed. VIDED. (Distributed)
Apr 4 2005	Brief amici curiae of National Conference of State Legislatures, et al. filed. (Distributed)
Apr 4 2005	Brief amici curiae of Illinois, et al. filed. (Distributed)
Apr 18 2005	Record received from Circuit Court of Michigan. (2 boxes)
Apr 19 2005	Reply of petitioners American Trucking Associations, Inc. and USF Holland, Inc. filed. (Distributed)
Apr 19 2005	Reply of petitioners Mid-Con Freight Systems, Inc. et al. filed. VIDED.(Distributed)
Apr 20 2005	Record received from Supreme Court of Michigan. (1 envelope)
Apr 26 2005	Argued. For petitioners in 03-1230: Robert Digges, J., Alexandria, VA. For petitioners in 03-1234: James H. Hanson, Indianapolis, Ind. For respondents: Henry J. Boynton, Assistant Solicitor General, Lansing, Mich.; and Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supreme Court, U.S.
FILED

03-1230 MAR 1 2004

OFFICE OF THE CLERK

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., and USF HOLLAND, INC.

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the Michigan Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Michigan imposes an annual tax on motor carriers of $100 per vehicle for the privilege of transporting property between points within the State. Though accepting that it "may be" that interstate motor carriers wishing to make such intrastate hauls "invariably will pay a higher per mile fee than the carrier who operates solely intrastate," the Michigan Court of Appeals upheld the tax over petitioners' Commerce Clause challenge. Deepening a split among state courts of last resort, the Michigan Court of Appeals reasoned that (i) this Court's "fair apportionment" requirement does not apply to taxes that are used to fund regulatory activities and (ii) petitioners could not rely on the discriminatory structure of the tax and instead were required to adduce evidence that particular trucking companies' "route choices are affected by imposition of the fee." Against this background, the question presented is:

Whether an unapportioned flat tax like Michigan's can be spared from invalidation under the Commerce Clause on the ground that it is used to pay for regulatory activities and/or because the taxpayer did not adduce evidence quantifying the discriminatory effect of the tax on interstate commerce.

RULES 14.1 AND 29.6 STATEMENT

The parties to the proceeding in the Michigan Court of Appeals were Westlake Transportation, Inc., Vanverkooi Carriers, Inc., El Toro Motor Freight, Inc., Myriah, Inc., Prism, Inc., Gerrigs Trucking & Leasing, Inc., Best Way Express, Inc., Troy Cab., Inc., Deeco Services, Inc. d/b/a Deeco Transportation, Tiberio Frank d/b/a Fairfield Towing, Elex, Inc. d/b/a/ Lafond Express, Dale Constine & Sons, Inc., Calcut Sales & Services, Inc. d/b/a Calcut Trucking Company, Ambassador Transportation, Inc., Hawkins Steel Cartage, Inc., Midcon Freight Systems, Inc., JLH Transfer, Inc., H & H Enterprises, Inc. d/b/a S & M Cartage, Inc., Central Transport, Inc., Bancroft Trucking Company, US Truck Company, Inc., West End Cartage, Inc., Central Cartage Company, CTX, Inc., Mohawk Motor Michigan, Inc., Economy Transport, Inc., McKinlay Transport Limited, Mason & Dixon Lines, Inc., Universal Amcan Limited, Romeo Expediters, Inc., Tom Thumb Services, Inc. d/b/a REI, OJ Transport Company, JLAW Enterprises, Inc., OJ Transport, Inc., Michigan Public Service Commission, Michigan Department of Treasury, Michigan Department of Commerce, the State of Michigan, American Trucking Associations, Inc., and TNT Holland Motor Express, Inc. Petitioner TNT Holland Motor Express, Inc. has since become USF Holland, Inc.

The parent company of petitioner USF Holland, Inc. is USF Corporation. No publicly held corporation owns more than 10% of the stock of USF Holland, Inc. Petitioner American Trucking Associations, Inc., has no parent corporation and there is no publicly held company owning 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners American Trucking Associations, Inc. ("ATA") and USF Holland Motor Express, Inc. ("USF") respectfully petition for a writ of certiorari to review the judgment of the Michigan Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals (App. *infra*, 1a-32a) is reported at 662 N.W.2d 784. The opinions of the trial court (App., *infra*, 33a-60a) and the orders of the Michigan Supreme Court denying review (App., *infra*, 61a-63a) are unreported.

JURISDICTION

The order of the Michigan Supreme Court denying review of the judgment of the Michigan Court of Appeals was entered on December 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

Section 478.2(1) of the Michigan Compiled Laws provides in relevant part:

> In addition to the license fees or taxes otherwise imposed upon motor carriers, there shall be assessed against and collected from each such motor carrier for the administration of this act, an annual fee of $100.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier[.]

STATEMENT

The decision below injects an illogical and dangerous loophole into the limitations imposed by the Commerce Clause upon state taxing authority. This Court has held that state taxes affecting interstate commerce must be fairly apportioned among taxing jurisdictions, thus ensuring that no State "take[s] more than its fair share of taxes from [an] interstate transaction." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). The Court also has held that a state tax may not discriminate in its practical effect against participants in interstate commerce. Flat state taxes, the Court has concluded, run afoul of both of these principles.

In this case, however, the Michigan Court of Appeals upheld just such a flat tax, reasoning that (1) the apportionment requirement does *not* apply so long as the revenues collected under a given tax are used to pay the costs associated with state regulatory activity; and that (2) taxpayers may not rely on the inherently discriminatory structure of a tax, and instead are obliged to adduce evidence that the tax affects their operations in a discriminatory way. That decision plainly departs from this Court's holdings, permits the imposition of cumulative and discriminatory burdens on interstate commerce, contributes to a growing disarray in the lower courts, and sows considerable confusion in an already complex area of the law. Further review therefore is warranted.

1. Michigan imposes a flat tax of $100 per vehicle on motor carriers that transport property between points within the State ("the Michigan tax"). MCL § 478.2(1). The same tax must be paid both by vehicles that confine their operations to Michigan and by those that engage in a combination of interstate and intrastate operations.[1] The amount due does not

[1] A separate charge of $100 per vehicle is imposed on vehicles registered in Michigan that operate exclusively in interstate commerce. MCL § 478.2(2). In addition, the State requires trucks

vary according to miles traveled or number of trips taken in Michigan, and is not apportioned to reflect the portion of time that a truck devotes to traveling between states or intrastate in states other than Michigan. Proceeds from the fee are used primarily for the "administration" of Michigan's law relating to the operation of motor carriers. *Ibid.*; see App., *infra*, 22a.[2]

To illustrate the operation of the Michigan tax, consider the example of a truck that accrues virtually all of its annual mileage traveling interstate, but makes a single intrastate delivery while passing through Michigan by "topping off" its interstate haul with cargo that is transported between two points within the State.[3] That truck is obligated to pay the full $100 Michigan tax. At the same time, an identical truck that travels the same number of annual miles but confines its operations to Michigan, conducting hundreds of trips within the State during

that are registered outside Michigan to pay a registration fee of $10. MCL § 478.7. The validity of these charges is not at issue here.

[2] Prior to 1995, Michigan had a comprehensive regulatory system governing the intrastate transportation of property by motor carriers. During that period, the proceeds from the Michigan tax were used to pay for administration of this system. See MCL § 475.2. As of January 1, 1995, Congress preempted most state economic regulation of intrastate trucking operations, including regulation of intrastate prices, routes, and services; states retained responsibility for regulation of highway safety. See Federal Aviation Administration Authorization Act of 1994, Pub. L. 103-305, § 601(a)(1), 108 Stat. 1605, codified at 49 U.S.C.§ 14501(c). Michigan did not amend its motor carrier law to reflect this change (see App., *infra*, 23a n.11), although the State now takes the position that fees collected pursuant to the Michigan tax are devoted to non-preempted regulation of highway safety, financial fitness, and insurance requirements for motor carriers. See *id.* at 19a.

[3] This is a realistic example; interstate truckers often supplement their interstate deliveries by topping of those loads with intrastate shipments or by hauling intrastate loads while between interstate movements. See App., *infra*, 31a.

the course of the year, will pay the same $100 tax. The only way for the interstate truck to avoid payment of the Michigan tax would be for it to forgo intrastate business while it is passing through Michigan.

2. Petitioners ATA and USF brought this challenge in Michigan state court to contest the constitutionality of the Michigan tax under the Commerce Clause.[4] Petitioners relied on the familiar four-part Commerce Clause test first articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), which establishes that a state tax will be deemed unconstitutional unless it "'[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'" *Jefferson Lines*, 514 U.S. at 183 (quoting *Complete Auto Transit*, 430 U.S. at 279). Petitioners maintained that the Michigan tax failed the apportionment and anti-discrimination elements of the *Complete Auto Transit* test, contending that the invalidity of the tax was established by the Court's decision in *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987), which struck down a flat state tax imposed on trucks traveling interstate.

The trial court rejected the challenge, upholding the Michigan tax. App., *infra*, 33a-45a. The court declared itself "not persuaded that the choice of whether to engage primarily

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[4] The current petitioners intervened to advance their Commerce Clause claim in a suit initiated as a class action by other plaintiffs that challenged other Michigan trucking fees on federal preemption and state-law grounds, and that also contested the Michigan tax on preemption grounds. See App., *infra*, 3a. The courts below denied all of the claims and upheld all of the challenged levies. See *id.* at 5a-32a. Only the Commerce Clause challenge to the Michigan tax is at issue in this petition. Our understanding is that the preemption aspect of the decision below will be challenged by other petitioners in a petition to be captioned *Mid-Con Freight Systems, Inc.* v. *Michigan Public Service Commission*.

in interstate rather than exclusively in intrastate transportation, made by private businesses competing in the free marketplace, affects Commerce Clause concerns." *Id.* at 43a. Moreover, because the court believed that "the fee itself is not a tax on the privilege of doing business in Michigan," it concluded that "Commerce Clause interests are not affected by the intrastate vehicle fee." *Id.* at 44a. The court added that the "interest furthered by [the] fee" – that of ensuring "that vehicles and carriers operating on Michigan highways in intrastate service comply with [state] safety and fitness norms" – does "not have a prejudicial effect on interstate commerce and thus does not impact the Commerce Clause." *Ibid.* Similarly, the court reasoned that, because interstate and intrastate carriers are not competing for interstate business, the Michigan tax "does not implicate Commerce Clause concerns." *Id.* at 45a. See *id.* at 46a-60a (denying rehearing).

The Michigan Court of Appeals affirmed, although on a different ground. App., *infra*, 1a-32a. The court began by repudiating the trial court's rationale, explaining that "any tax or regulation which effects [*sic*] interstate travel, even if imposed solely on intrastate commerce, is subject to Commerce Clause analysis. * * * Because the fee is imposed on any vehicle which operates intrastate pursuant to a certificate of authority, even if it also travels interstate, the fee affects interstate commerce, and thus, implicates the dormant Commerce Clause." *Id.* at 28a-29a.

Having said that, however, the court proceeded to uphold the Michigan tax. In doing so, the court relied upon an earlier aspect of its decision in which it determined, as a matter of state law, that the Michigan tax should be characterized as a "fee" rather than a "tax" because (1) most of its proceeds are used to enforce the regulatory provisions of Michigan's motor carrier law and (2) the aggregate fee revenues collected "are proportional to the cost of the services to which they relate."

App., *infra*, 22a-26a.[5] From that starting point, the court held that the *Complete Auto Transit* test is wholly inapplicable to the Michigan tax on the ground that "this test is used to analyze the constitutionality of state taxation statutes which tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, * * * not regulatory statutes." *Id.* at 29a n.16. Because the court had found the Michigan tax to be a "regulatory fee," it disregarded *Complete Auto Transit* and instead applied the balancing test used by this Court in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), to assess the constitutionality of state *regulations* affecting interstate commerce. See App., *infra*, 29a n.16, 31a-32a.

The court recognized that even "regulatory fees" may not discriminate against interstate commerce, and acknowledged that, under the Michigan tax, it "may be" that "mixed [interstate and intrastate] carriers invariably will pay a higher per mile fee than the carrier who operates solely intrastate." App., *infra*, 30a-31a. The court similarly noted the possibility "that because the fee is a flat annual fee, in order to receive the greatest benefit for the fee, a carrier would need to maximize its intrastate operations and this could potentially affect a carrier's economic decision-making by discouraging an intrastate carrier from engaging in interstate commerce." *Ibid.* But the court nevertheless rejected the claim of discrimination against interstate operations, opining that the prospect of discrimination "is a matter of pure speculation" because petitioners "present no evidence that any trucking firm's route choices are affected by imposition of the fee." *Id.* at 31a. The court added that "[a]ny effect the fee has on interstate commerce is incidental and does

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[5] The court undertook this analysis in response to the argument that various Michigan levies, including the Michigan tax, "are unconstitutional taxes in violation of various sections of the Michigan constitution." App., *infra*, 20a. The court concluded that state law distinguished between "a permissible fee" and "an illegal tax," and that the challenged levies should be characterized as fees for purposes of Michigan law. *Ibid.*; see *id.* at 22a-24a.

not rise to the level of discrimination." *Ibid.* The court went on to uphold the Michigan tax under the standard articulated in *Pike* v. *Bruce Church* because "we cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways." *Id.* at 31a-32a.

The Michigan Supreme Court denied review without opinion. App., *infra*, 61a-63a.

REASONS FOR GRANTING THE PETITION

This case presents a recurring issue of great practical importance: whether the fair apportionment and anti-discrimination requirements of the Commerce Clause invalidate flat state taxes on participants in interstate commerce. The decision below, which approved such a tax, should not stand. That decision cannot be reconciled with *Scheiner* and other of this Court's precedents; contributes to a growing disarray in the lower courts about the meaning of the controlling Commerce Clause principles; and reads a wholly illogical and unadministrable distinction into the law. Because the legal question presented here is one of considerable significance to jurisdictions across the Nation, review of the decision below is warranted.

A. The Decision Below Cannot Be Reconciled With This Court's Precedents Requiring The Apportionment Of Taxes On Participants In Interstate Commerce

1. Flat taxes like the Michigan tax do not satisfy the Commerce Clause apportionment requirement

At the outset, there can be no doubt that the decision below is inconsistent with this Court's precedents regarding the necessity of apportioning state taxes that fall on participants in interstate commerce – and that it offers other courts and state taxing authorities a roadmap for evading Commerce Clause requirements. A fundamental purpose of the Clause is to

preclude States from "'tax[ing] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *Scheiner*, 483 U.S. at 280 (quoting *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984)). As we have noted, the test articulated in *Complete Auto Transit* gives force to this requirement by mandating that a state tax be deemed unconstitutional unless, among other things, it is "fairly apportioned." *Complete Auto Transit*, 430 U.S at 279.

Satisfaction of the apportionment requirement is in turn determined by application of the "internal consistency" test. As the Court has explained,

> *any* threat of malapportionment [is assessed] by asking whether the tax is "internally consistent" * * * . Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. *A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction*[.]

Jefferson Lines, 514 U.S. at 185 (emphasis added). See also *Tyler Pipe Indus.* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 247 (1987); *Armco*, 467 U.S. at 644-646. *All* taxes therefore must be judged for internal consistency, with failure of the internal consistency test establishing unconstitutionality of the tax as a matter of law. And flat taxes such as Michigan's necessarily fail the test.

The Court's decision in *Scheiner*, which applied the internal consistency test to invalidate flat highway taxes that were identical in their constitutional defects to the levy challenged

here, explains why this is so. *Scheiner* involved a challenge to two flat taxes – a "marker fee" and an "axle tax" – imposed by Pennsylvania on both interstate and intrastate truckers. See 483 U.S. at 273-275. In holding the taxes unconstitutional, the Court explained that the Commerce Clause "'by its own force created an area of trade free from interference by the States'" (*id.* at 280, quoting *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977)), and then concluded that

> [t]he unapportioned flat taxes * * * penalize some travel within the free trade area. Whether the full brunt, or only a major portion, of their burden is imposed on the out-of-state carriers, their inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania. To pass the "internal consistency" test, a state tax must be of a kind that, "if applied by every jurisdiction, there would be no impermissible interference with free trade." *Armco Inc.* v. *Hardesty*, 467 U.S., at 644. If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred.

Id. at 284.

The reason is obvious: unapportioned levies necessarily impose cumulative burdens on interstate commerce that are not borne by equivalent intrastate activity – and that is so whether the flat tax is imposed on the privilege of entering the state or on the privilege of engaging in business within the state. Imagine, for example, a flat tax of $100 (like the one set by Michigan in this case) that is imposed on all trucks that use a State's roads to make an intrastate delivery. If identical taxes were imposed by the 48 contiguous States, a truck that traveled across the country and made intrastate as well as interstate deliveries along the way would pay annual fees of as much as $4800; an identical truck that confined its business to one State but traveled the same number of miles and made the same number of intrastate trips would pay only $100. As a

consequence, it is inevitable that flat levies like the Michigan tax are malapportioned because they "'bear much more heavily in the aggregate on a firm that sells in many places than on a firm otherwise identical * * * that sells in only one place.'" *Id.* at 285 n.20 (quoting Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1188 (1986)).

With this principle in mind, one of the leading commentators in this area has explained that

> the imposition of *any* unapportioned flat state or local tax on a multistate business would appear to be vulnerable to attack under the "internal consistency" doctrine * * * . This conclusion follows inexorably from a simple application of the "internal consistency" principle. If every state were to impose an unapportioned flat tax on business activities in which both intrastate and interstate enterprises engage, the interstate business would pay the tax in each state in which it did business, whereas its intrastate competitor would pay but a single tax in the state in which it did business. Because the tax is not apportioned to the activity carried on in the state, the interstate enterprise would bear a heavier tax burden than its intrastate competitor merely because it was engaged in interstate commerce — a paradigmatic "impermissible interference with free trade."

Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 153-154 (1988) (quoting *Armco*, 467 U.S. at 644) (emphasis in original; footnote omitted). See also *Scheiner*, 483 U.S. at 303-304 (Scalia J., dissenting) (the internal consistency principle as stated by the Court requires the invalidation of "any unapportioned flat tax on multistate

activities"); *Tyler Pipe*, 483 U.S. at 254 (Scalia, J., dissenting) (same).[6]

Here, the Michigan tax plainly fails the internal consistency test: it is a flat, unapportioned levy that is imposed on interstate trucks whenever a portion of their trip has an intrastate component in Michigan. If replicated by other states, such a tax would impose potentially crushing, cumulative burdens on trucks traveling in interstate commerce. Indeed, in its practical effect the Michigan tax is *more* pernicious than the one invalidated in *Scheiner* because it penalizes interstate carriers who choose to compete with local truckers for intrastate business in Michigan. Under the Michigan tax regime, local and interstate businesses pay the same amount for a privilege that is inherently more valuable to the local company – a reality that will either put interstate carriers at a competitive disadvantage or induce those carriers to abandon the intrastate market altogether. By the same token, because Michigan truckers would run the risk of subjecting themselves to intrastate fees imposed by other states were they to cross state lines, the Michigan tax also certainly "tends, at least, to discourage domestic corporations from plying their trades in interstate commerce." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325,

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[6] Many other courts have invoked *Scheiner* to invalidate a wide range of flat state taxes or fees. See, *e.g.*, *Trailer Marine Transport Corp.* v. *Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992) (invalidating flat annual fee used to support no-fault insurance fund); *Kentucky* v. *American Trucking Ass'ns*, 746 S.W.2d 65, 67 (Ky. 1988) (invalidating flat highway privilege tax); *Black Beauty Trucking, Inc.* v. *Indiana Dept. of State Revenue*, 527 N.E.2d 1163, 1165 (Ind. Tax 1988) (invalidating flat highway privilege tax); *American Trucking Ass'ns* v. *Goldstein*, 541 A.2d 955, 957-958 (Md. 1988) (invalidating flat fuel tax registration fee); *American Trucking Ass'ns* v. *State*, 556 N.W.2d 761 (Wis. Ct. App.) (invalidating flat hazardous waste transportation fee), rev. denied, 560 N.W.2d 274 (Wis. 1996); *American Trucking Ass'ns* v. *Conway*, 566 A.2d 1335, 1337-1338 (Vt. 1989) (invalidating flat fuel-user license fee).

333 (1996). Such an outcome is precisely what the Commerce Clause apportionment requirement was designed to avoid.[7]

2. *A levy cannot escape the apportionment requirement simply because its proceeds are used for regulatory purposes*

In nevertheless upholding the constitutionality of the Michigan levy, the court below did not deny that the tax was unapportioned and did not attempt to reconcile its decision with the mandate of *Scheiner*. Instead, the court held that a tax need not satisfy the *Complete Auto Transit* test and the requirement of internal consistency – and, in fact, is not subject to the apportionment requirement *at all* – so long as it is "regulatory" in nature. The Michigan tax is "regulatory," the court had earlier concluded, because its proceeds are devoted to "promoting and regulating safe use of the highways" and the aggregate amount of the fees collected is "proportionate to the cost of the regulation." App., *infra*, 24a. See also note 2, *supra*. Having

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[7] It is no answer to this point to suggest, as the State did below, that a carrier with a fleet of many trucks could avoid competitive disadvantage by dedicating a portion of its fleet exclusively to intrastate commerce in Michigan. As this Court has held repeatedly, "such promotion of in-state markets at the expense of out-of-state ones furthers the 'economic Balkanization' that our dormant Commerce Clause jurisprudence has long sought to prevent" (*Fulton Corp.*, 516 U.S. at 333 n.3); a state may not impose "a tax which is 'discriminatory in favor of the local merchant'" so as to "encourag[e] an out-of-state operator to become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 72 (1963) (citation omitted). Moreover, the approach suggested by the State simply is not practical. An out-of-state carrier with many trucks cannot know in advance which vehicles will be in position to take advantage of the opportunity to make an intrastate haul in Michigan; a carrier that hopes to get intrastate business as that business becomes available will have no choice but to register all of its trucks in Michigan – and in all other states that adopt similar intrastate fees.

thus characterized the levy here as "regulatory," the court rejected fair apportionment as a requirement and concluded that the applicable standard is the one set forth in *Pike* v. *Bruce Church* for assessing the validity under the Commerce Clause of regulations themselves, *not* levies used to pay for regulatory activity.[8]

This holding, however, rests on a manifest evasion of this Court's precedents. As noted above, the Court has established that "[a] failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction." *Jefferson Lines*, 514 U.S. at 185. And whatever the validity of a Commerce Clause distinction between taxes and *regulations*, we would have thought it obvious that a tax whose revenues are dedicated to paying for the enforcement of a regulation is just that: a tax and *not* a form of regulation. This surely is a place for application of the "quacks like a duck" principle; the Michigan court's contrary conclusion, which accords taxes differing constitutional treatment depending upon what they are called and what they pay for, "has no relationship to economic realities" and "focus[es] on [a] formalism [that] merely obscures the question whether the tax produces a forbidden effect." *Complete Auto Transit*, 430 U.S. at 279, 288.

It therefore is no surprise that the Michigan court's decision to hinge the constitutionality of the tax on the uses to which the tax revenue will be put departs from this Court's holdings in

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[8] If the court below meant to suggest that the *Complete Auto Transit* test applies only to state taxes that "tax interstate commerce itself" (App., *infra*, 29a n.16), it plainly was wrong. In fact, "[s]tate taxes levied on a 'local' activity preceding entry of goods into interstate commerce may substantially affect interstate commerce, and this effect is the proper focus of Commerce Clause inquiry." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 616 (1981). Such a tax "must be evaluated under *Complete Auto Transit*'s four-part test." *Id.* at 617.

several fundamental respects. *First*, the court below disregarded the undeniable fact that the Michigan tax's effect on interstate commerce is essentially identical to that of the tax invalidated in *Scheiner*. In both cases the flat levies, if imposed by other states, would have had a "'cumulative effect'" on interstate trucks that would "'not result from the mileage or distance traveled, but from the interstate character of the journey. The same mileage in one state would result in only one tax.'" *Scheiner*, 483 U.S. at 285 n.16 (quoting Lockhart, *State Tax Barriers to Interstate Trade*, 53 HARV. L. REV. 1253, 1269 (1940)). In both cases the interstate vehicle paid for something that "'[i]n the general average of instances * * * is not as valuable to the interstate as to the intrastate carrier.'" *Id.* at 291 (citation omitted). And in both cases the effect of the tax was to "exert an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.* at 283, 286-287 (quoting U.S. Const., Art, I, § 8, cl. 3). Like the levy in *Scheiner*, the Michigan tax accordingly "produce[d] a forbidden effect" (*Complete Auto*, 430 U.S. at 288) – and that is the crucial consideration for Commerce Clause purposes.

Thus, as Professor Hellerstein has observed,

> there is no reason to believe that a regulatory license fee would be immune from the "internal consistency" requirement merely because it constituted an exercise of the state's regulatory power rather than an exercise of the state's taxing power. Surely the evils that the "internal consistency" test was designed to combat are the same regardless of whether the unapportioned flat levy is an exercise of the tax power or the regulatory power. In each case, the licensee carrying on his trade in more than one jurisdiction bears a greater financial burden than his intrastate competitor merely because he is engaging in interstate commerce with the consequent interference with free trade among the states. Hence there does not appear to be any sound policy basis for distinguishing the "fee" from the "tax" cases insofar as the application of the "internal consistency" doctrine is concerned.

Hellerstein, *supra*, 87 MICH. L. REV. at 157.

Second, the distinction drawn by the Michigan court – between a tax whose revenues are used "to enforce [regulatory] provisions" and a tax "designed to raise revenue for the general public" (App., *infra*, 24a) – makes no sense when applied to the Commerce Clause. For reasons we have just noted, the burden on interstate commerce is not reduced in any respect because the tax revenues are used to finance regulatory activity rather than, for example, highway repairs. Again, *Scheiner* provides an illustration of the point. The taxes there were imposed on all trucks that traveled Pennsylvania's roads and were dedicated to financing "road-related expenditures," including "highway maintenance." 483 U.S. at 270, 271. The burden that those taxes imposed on interstate trucks would not have been reduced (or affected in any way) if the revenues instead had been devoted to paying for safety inspections, sobriety checks, highway patrol salaries, or any other arguably "regulatory" activity. Indeed, such a "regulatory fee" would, if anything, appear to be *more* burdensome than a general revenue tax because it would be part of a package that subjected trucks to a double whammy: the trucker would both pay the tax *and* bear the burden of potentially costly state regulation.[9]

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[9] This is not to deny, of course, that there may be circumstances in which there are relevant distinctions between general revenue taxes and special purpose fees. Some statutes, for example, accord differing treatment to the two types of levy. See, *e.g.*, *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974) (addressing whether a particular charge is a "fee" within the meaning of the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a, revised and recodified at 31 U.S.C. § 9701); *Union Pac. R. Co.* v. *Public Utility Comm'n*, 899 F.2d 854 (9th Cir. 1990) (addressing whether a particular levy is a "tax" within the meaning of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503(b), recodified at § 11501). But these decisions have no bearing on the

Third, flat taxes like the ones at issue here and in *Scheiner* are quite different from per-use fees, such as highway tolls, that have survived Commerce Clause attack. The latter type of fee is neither malapportioned nor discriminatory because it is calibrated to charge every user for each use of a particular service provided to the taxpayer (or to compensate the State for every expense imposed upon the State by the taxpayer). In the highway toll example, the traveler who takes ten trips on the highway will pay the toll ten times, while the traveler who passes through once will pay only a single toll; in-state travelers have no special advantage because the fee "'is based on some fair approximation of use or privilege for use.'" *Scheiner*, 483 U.S. at 289 (quoting *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716-717 (1972)). Here, the Michigan court opined that the tax at issue is "proportionate to the cost of regulation" (App., *infra*, 24a) – but it meant by this that fee revenue *in the aggregate* was used to pay for the State's regulatory program. See *id.* at 25a-26a. By definition, such a fee, which does not vary according to mileage traveled or number of trips taken, cannot reflect a reasonable approximation of the *individual taxpayer's* use of state services.

Fourth, the line drawn by the court below invites inconsistency and manipulation. Because that line is not grounded in Commerce Clause policies, there is no principled way to determine whether a given tax must be deemed a "regulatory fee." In this case, for example, the Michigan court declared the challenged tax to be regulatory because its proceeds ostensibly are used to "promot[e] and regulat[e] safe use of the highways." App., *infra*, 24a. But this approach makes the form of the tax dispositive and invites manipulation by legislative draftsmen – a danger that is particularly acute

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question whether the purposes of the Commerce Clause permit the drawing of a similar distinction between taxes and fees. See Rothfeld, *Scheiner's Next Wave: Distinguishing Taxes From Fees Under the Commerce Clause*, 17 STATE TAX NOTES 1681, 1686 (1999).

because the court below used a *state-law* test to determine whether a levy is a "fee" and therefore exempt from the federal apportionment requirement.[10] As a consequence, the Michigan court's holding would allow States to pay for a wide range of activities through the imposition of flat fees, in the process exporting much of their tax burden to out-of-state taxpayers. The inevitable consequence of such a rule would be to "divide and disrupt the market for interstate transportation services." *Scheiner*, 483 U.S. at 285.

3. The lower courts have taken conflicting approaches to the Commerce Clause apportionment requirement

In addition to departing from this Court's precedents, the decision below contributes to considerable confusion and disarray among state courts of last resort and federal courts of appeals about the applicability of the apportionment requirement to taxes that are used to finance regulatory activity. Many courts have faithfully applied *Scheiner*, holding in a range of settings that flat taxes on interstate commerce (in particular, on interstate motor carriers) fail the internal consistency test and therefore are unconstitutional. Other courts, however, have adopted the approach used below and departed from *Scheiner*, ruling that exactions need not be apportioned so long as they are levied to finance regulatory activity.

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[10] In fact, the bankruptcy of this approach is illustrated by the fact that the regulatory program assertedly served by the Michigan tax underwent a radical change in 1995, when Congress preempted state regulation of the prices, routes, and services of intrastate trucking operations. See note 2, *supra*. As the court below itself noted (App., *infra*, 23a n.11), federal law thus displaced most of the purposes served by the Michigan regulatory program pursuant to which the Michigan tax is assessed. Michigan, however, has not adjusted the amount of the fee collected. As this history suggests, it is a simple enough matter for a state to change the asserted "regulatory" justification for a fee when doing so suits its purpose.

a. The Michigan court's holding cannot be reconciled with a body of decisions that have applied the internal consistency test to invalidate taxes on interstate truckers, even when the tax was enacted for ostensibly regulatory purposes and even if it was denominated a "fee." In *American Trucking Ass'ns* v. *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993), for example, the Supreme Judicial Court of Massachusetts struck down an impost that in its relevant respects was identical to the one here. Massachusetts imposed a flat $200 fee on every vehicle that entered the Commonwealth and that was engaged in the transportation of hazardous waste. The fee was used "'solely for the purposes of the administration and implementation of the permitting, compliance and enforcement, monitoring and analysis, and technical assistance programs of the department of environmental protection'" (*id.* at 99 (citation omitted)); it paid for the "random inspection of vehicles, processing monthly reports, providing education and technical assistance, and enforcement." *Id.* at 102. These purposes surely are at least as "regulatory" as those advanced by the Michigan program.

In nevertheless holding the tax invalid under the Commerce Clause, the Massachusetts court began by noting that "[i]t is of no relevance what label is attached to the assessment imposed by the State" so long as the fee has "an impermissible effect on free trade." 613 N.E.2d at 99 n.9. The court found "no merit to the Commonwealth's claim that the internal consistency test does not apply to user fees" (*id.* at 102) and did not treat the use that Massachusetts made of the revenues collected under the fee as at all relevant to the Commerce Clause inquiry.

The Supreme Judicial Court of Maine reached the same conclusion in *American Trucking Ass'ns* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991), invalidating another flat, annual per truck "hazardous material fee" imposed on vehicles that transported hazardous substances in the State. *Id.* at 1015. The fee was devoted, in part, to paying "costs related to vehicle inspection and enforcement" (*ibid.*); it also was used to support

the state hazardous waste fund, to pay administrative costs, and to finance "hazardous materials training of local and state officials." *Ibid.* Explaining that *Scheiner* "clearly elevates substance over form," the court rejected the State's argument that the internal consistency test did not apply because the tax was characterized as a "[r]egulatory [l]icense [f]ee." *Ibid.* The court went on to conclude that "a tariff such as the one imposed here is forbidden if it produces the prohibited discriminatory effects on interstate commerce whether designated as a 'fee' or a general revenue 'tax.'" *Id.* at 1016. That was true of the challenged levy, the court held, because

> if each state imposed such a fee, a truck traveling 100,000 miles interstate could conceivably pay 49 times more in hazardous waste tariffs than a truck that traveled 100,000 miles strictly within the state. This would clearly violate the "internal consistency test," which forbids tariffs that would interfere with free trade by penalizing some travel.

Id. at 1017 (citation omitted).

Similarly, in *Government Suppliers Consolidating Servs., Inc.* v. *Bayh*, 975 F.2d 1267 (7th Cir. 1992), cert. denied, 506 U.S. 1053 (1993), the Seventh Circuit rejected the distinction relied upon by the court below. *Government Suppliers* invalidated a flat semi-annual fee imposed on vehicles that engaged in municipal waste collection and transportation. The fees were "used to implement the waste disposal regulatory system to which registrants are subject. They d[id] not revert to the state general fund. * * * [T]heir purpose [was] regulatory * * *." *Id.* at 1271 n.2. Relying on *Scheiner*, the court nevertheless held the fee to violate the Commerce Clause because it "raises a financial barrier around the State." *Id.* at 1281. The court added that, "[i]f other states were to adopt registration fees similar to Indiana's, the divisive and disruptive effect on interstate commerce in municipal waste would be magnified." *Id.* at 1282. Again, the court did not treat the regulatory purpose of the fee as in any way relevant to the Commerce Clause inquiry.

b. Other courts, however, have adopted the approach taken below, holding that the apportionment requirement does not apply to exactions that are used to finance regulatory activity. Thus, in *Franks & Son, Inc.* v. *Washington*, 966 P.2d 1232 (Wash. 1998), cert. denied, 526 U.S. 1066 (1999), the Washington Supreme Court upheld a flat fee used to pay for "safety programs and inspections related to trucks on Washington's roads." *Id.* at 1242. The court reasoned that a "regulatory fee [is] not a tax subject to the apportionment requirement" and that "the stringent standard for appraising tax measures does not apply where the statute at issue qualifies as a regulatory measure." *Id.* at 1240, 1241. Like the Michigan Court of Appeals here, the Washington court turned to the balancing test applied in *Pike* v. *Bruce Church, Inc.*, concluding that the Washington tax passed this test. *Id.* at 1240-1243.[11]

This plain inconsistency in the approaches of the lower courts warrants this Court's attention. Courts are applying the Commerce Clause in fundamentally differing ways, leading to the invalidation in some jurisdictions of taxes that are identical to those that have been upheld elsewhere. In these circumstances, the Court should grant review to bring uniformity to this important area of the law.

B. The Michigan Tax Discriminates Against Interstate Commerce

The decision below also departs from the analysis used by this and other courts in a second respect: the Michigan court erred in failing to recognize the discriminatory nature of the Michigan tax. The court below recognized that it "may be" that "the mixed [inter- and intrastate] carrier invariably will pay a higher per mile fee than the carrier who operates solely intrastate," and "that because the fee is a flat annual fee, in order to receive the greatest benefit for the fee, a carrier would need

[11] The Washington tax was repealed before the petition for certiorari was filed in *Franks & Son*. See No. 98-1282, Pet. 3 n.3.

to maximize its intrastate operations and this could potentially affect a carrier's economic decision-making by discouraging an intrastate carrier from engaging in interstate commerce." App., *infra*, 28a. Having said that, however, the court rejected the claim of discrimination on the ground that "it is a matter of pure speculation." *Ibid.* That conclusion is insupportable.

1. To begin with, this Court has made clear that flat taxes *necessarily* discriminate against interstate interests and that empirical evidence of the discriminatory effect of such a tax is not necessary. More than fifty years ago, in *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946), the Court struck down a flat municipal license fee imposed on solicitors doing business in the city. The Court explained:

> the tax * * * cannot be taken to apply generally to local distributors in the same manner and with like effects as in application to out-of-state distributors. The very difference in locations of their business headquarters, if any, and of their activities makes this impossible. This, of course, is but another way of saying that the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application between those two classes of commerce, generally speaking, impossible.

Id. at 432.

The Court applied this conclusion to taxes on interstate motor carriers in *Scheiner*, noting that flat taxes necessarily disadvantage interstate businesses: "[T]he very nature of the market that interstate operators serve prevents them from making full use of the privilege * * * for which they have paid the State" a flat fee. 483 U.S. at 284 n.16. Thus,

> "the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego the privilege some of the time simply because of its interstate character, *i.e.*, because it operates in other States as well. In the general average of instances, the

privilege is not as valuable to the interstate as to the intrastate carrier."

Id. at 291 (quoting *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting)).

Against that background, the discriminatory impact of a flat levy like the Michigan tax is undeniable. On average, a trucking company that confines its operations to intrastate travel will drive far more miles within the taxing state and will obtain a vastly greater benefit from its intrastate fee than will a company that travels both intra- and interstate. And "imposition of [a] flat tax[] for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause." *Scheiner*, 483 U.S. at 296.

For this reason, other state courts have held that empirical proof of discrimination is *not* required to invalidate a flat tax. As the Supreme Judicial Court of Massachusetts explained in a case that was virtually identical to this one, "[a]lthough the discriminatory impact of the fees is not precisely quantifiable because the stipulated facts do not include statistics regarding the average number of miles traveled annually in Massachusetts by local trucks and by those registered in other jurisdictions, it is intuitively obvious that local trucks derive far greater economic benefit from each of the challenged fees paid than do interstate trucks." *Secretary of Admin.*, 613 N.E.2d at 101. See also *Black Beauty Trucking, Inc.* v. *Indiana Dept. of State Revenue*, 527 N.E.2d 1163, 1165 (Ind. Tax 1988) ("[t]he discriminatory impact [of a flat tax] on the interstate carrier is readily apparent"); *American Trucking Ass'ns* v. *Goldstein*, 541 A.2d 955, 957 (Md. 1988) (court finds it sufficient that "interstate carriers[] might tend to travel fewer miles in Maryland and thus pay a higher per-mile price"); *American Trucking Ass'ns* v. *Conway*, 566 A.2d 1335, 1337 (Vt. 1989) (court concludes that *Scheiner* held "flat highway user taxes inherently discriminatory against interstate commerce"). The decision below cannot be reconciled with these holdings.

2. The Michigan court's understanding of the anti-discrimination principle also was flawed for a second reason. Having acknowledged the possible structural advantage that flat taxes provide to local competitors, the court rejected the claim of discrimination because it saw no evidence that in practice "the fee raises a *significant* barrier to participation in interstate trade. Any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination." App., *infra*, 31a (emphasis added).

The conclusion that the discrimination did not actually succeed in discouraging interstate commerce (even if true), however, cannot validate a discriminatory tax. The Court has held repeatedly that, "[o]nce a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." *Chemical Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 342 (1992). See, *e.g.*, *Oregon Waste Sys., Inc.* v. *Dept. of Env. Quality*, 511 U.S. 93, 101 (1994). The extent of the discrimination is immaterial so long as a state tax structure "tends, at least, to discourage domestic corporations from plying their trades in interstate commerce" or to discourage interstate companies from competing for local business; the Court has "never recognized a 'de minimis' defense to a charge of discriminatory taxation under the Commerce Clause." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 333 & n.3 (1996). See, *e.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 578 (1997) (discrimination against interstate commerce violates the Commerce Clause even if the affected entities "are not deterred by the statute from doing a principally interstate business"). For this reason as well, the decision below should be set aside

C. The Question Presented Here Is An Important And Recurring One

The Michigan court's holding thus both departs from this Court's decisions and exacerbates a conflict among the lower courts. This case also satisfies the remaining requisite for review by this Court: the question presented here – whether a state may avoid apportioning its taxes on interstate businesses so long as it devotes the tax revenue to the financing of regulatory activity and empirical proof of discrimination has not been provided – is a recurring one of continuing practical importance.

First, as the conflict in the lower courts makes clear, jurisdictions across the Nation continue to impose unapportioned taxes on interstate commerce – and, indeed, many impose flat taxes on interstate motor carriers that are indistinguishable in principle from the Michigan tax at issue in this case. A number of states, for example, impose flat per-vehicle or per-carrier fees on transporters of hazardous materials.[12] Revenues from these fees typically are devoted to

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[12] See, *e.g.*, Cal. Veh. Code §2502(c) ($100 motor carrier permit fee and $75 motor carrier renewal permit fee); Col. Rev. Stat. Ann. § 42-20-202(1)(b), (c) (transporters of hazardous waste pay flat annual fee, depending on number of vehicles operated in State, of $10 to $400; $25 single trip permit); Conn. Gen. Stat. Ann. § 22a-454(a) ($500 annual fee on transporters of hazardous waste); Code Del. Reg. 10-400-007 ($300 annual fee on transporters of hazardous waste); Ga. Code § 46-11-4 (i) ($100 annual motor carrier company permit fee); Iowa Code Ann. § 455B.424(5)(c) ($25 fee for transporters of hazardous waste); Kan. Admin. Regs. 28-31-10(f) ($300 annual "monitoring fee" on transporters of hazardous waste); Md. Code Ann. Envir. § 7-252(a)(2), (b)(2)(ii) (annual $50 vehicle certificate fee for hazardous materials transporters; annual $20 driver certificate fee); Mich. C.L.A. § 29.473(3) (in addition to apportioned fee, transporters of hazardous waste pay $50 "administrative fee"); Minn. Stat. Ann. § 221.0355(4)(b) (in addition to apportioned fee, transporters of hazardous waste pay $50 "processing fee"); Nev. Admin. Code § 459.9805(1)(b), (d) ($125 "general processing fee" for transporters of hazardous materials; $500 triennial "permit review fee"); N.J. Admin. Code §§ 7:26G-3.3(g) and 28 N.J.Reg. 1693, 1735 (Apr. 1, 1996) (flat hazardous waste transporter fees of various amounts ranging from $40 to $274, depending on the size of the vehicle); N.Y. ECL § 72-0502 (hazardous waste transporter pays annual $500 fee for first vehicle, $200 fee for each additional vehicle; other waste transporters pay $250 annual fee for first vehicle and $100 for each additional vehicle); N.C. Gen. Stat. § 130A-294.1(j) ($600 annual fee on transporters of hazardous waste); Ohio Rev. Code § 4905.80(C)(1)(a) (in addition to apportioned fee, hazardous waste transporters pay $50 "processing" fee); Tex. Nat. Res. Code § 113.131 (d)(1) (liquefied petroleum gas trailers and delivery units pay flat annual fee of $100 to $300); Tex. Nat. Res. Code § 116.072 (c)(1) (trailers and delivery units transporting compressed natural gas pay flat annual fee of $100 to $500); Wy. Stat. § 37-14-103 ($200 fee for each package of radioactive material transported in State).

regulatory, enforcement, and administrative expenses identical to those found dispositive by the Michigan court.[13] The validity

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[13] See, *e.g.*, Col. Rev. Stat. Ann. §§ 42-20-107, -202(5) (fee placed in hazardous materials safety fund and used for safety and administration purposes); Conn. Gen. Stat. Ann. § 16a-106(c) (fee used for "administering the provisions of this section"); 7 Del. Code Ann. § 6006(5)) (fee used "to carry out the purposes of this chapter"); Kan. Stat. Ann. § 65-3431(u) (fee used "for monitoring the transportation of hazardous wastes"); Mich. C.L.A. § 29.475(4) (fee devoted to "implementation of this act"); N.J. Stat. Ann. § 13:1E-18 (fees devoted to "services to be performed," including hazardous waste transporter enforcement operations, special investigations, and roadside checks); N.Y. ECL § 72-0201(11)(b) (one-half of hazardous waste transporter fees used "for the purposes of carrying out the provisions of this chapter"); N.C. Gen. Stat. § 130A-294.1(b) (fee used to provide technical assistance, facilitate "timely review of permit applications," insure that permit decisions are made on a sound basis, "[i]mprove monitoring and compliance of the hazardous waste management program," "[i]ncrease the frequency of inspections," provide support for the waste management program, and "[p]rovide resources for emergency response").

of the test used below to uphold the Michigan tax accordingly raises a vital question that will have to be addressed by this Court sooner or later. This case offers a suitable vehicle with which to provide such review.

Second, the Michigan court's decision will foment continuing litigation about the validity of unapportioned taxes. In response to the holding in *Scheiner*, several states candidly acknowledged that their flat motor carrier fees were unconstitutional.[14] But other states began a lengthy and continuing campaign to circumvent *Scheiner* by arguing, for example, that apportionment of their flat taxes was impracticable and therefore unnecessary,[15] or by contending that their taxes *were* per se properly apportioned because they were "user fees,"[16] or by asserting that the apportionment requirement was inapplicable because the costs imposed upon the state were unrelated to the miles traveled by the taxpayer in the jurisdiction.[17] The decision below marks the latest skirmish in this campaign and will provide powerful support and encouragement for additional litigation in this area. If flat "regulatory fees" are constitutional, legislators should be so informed and permitted to exercise their taxing authority freely; if those fees violate the Commerce Clause, the governing rules should be stated clearly so that states and localities may conform their taxes to constitutional requirements.

Third, the amount at stake in this one case is substantial. The amount of back taxes currently at issue in this litigation totals approximately $70 million. And interstate truckers

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[14] See, *e.g.*, *Goldstein*, 541 A.2d at 957, 958; *Conway*, 566 A.2d at 1337.

[15] See, *e.g.*, *American Trucking Ass'ns* v. *State*, 556 N.W.2d at 767-768.

[16] See, *e.g.*, *Secretary of Admin.*, 613 N.E.2d at 101-103.

[17] See, *e.g.*, *Secretary of State*, 595 A.2d at 1016.

continue to accrue some $3 million dollars in additional liability to Michigan every year under the Michigan tax. Because the legal issues here are important and recurring ones, and because the practical effects of the Michigan tax are significant, further review of the decision below plainly is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2004

APPENDIX

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., EL TORO MOTOR FREIGHT, INC., MYRIAH, INC., PRISM, INC., GERRIGS TRUCKING & LEASING, INC., and BEST WAY EXPRESS, INC.
Plaintiffs-Appellants,

and

AMERICAN TRUCKING ASSOCIATION, INC. and TNT HOLLAND MOTOR EXPRESS, INC.
Intervening Plaintiffs-Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, and the STATE OF MICHIGAN,
Defendants-Appellees.

FOR PUBLICATION
March 11, 2003
9:00 a.m.

No. 22 6052; 226122
Court of Claims
LC No. 95-015628-CM

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, TIBERIO FRANK, d/b/a FAIRFIELD TOWING, ELEX, INC., d/b/a LAFOND EXPRESS, DALE CONSTINE & SONS, INC., CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY, AMBASSADOR TRANSPORTATION, INC., HAWKINS STEEL

CARTAGE, INC., MIDCON FREIGHT SYSTEMS, INC., JLH TRANSFER, INC., H & H ENTERPRISES, INC., d/b/a S & M CARTAGE, INC., CENTRAL TRANSPORT, INC., BANCROFT TRUCKING COMPANY, US TRUCK COMPANY, INC., WEST END CARTAGE, INC., CENTRAL CARTAGE COMPANY, CTX, INC., MOHAWK MOTOR MICHIGAN, INC., ECONOMY TRANSPORT, INC., M CKINLAY TRANSPORT LIMITED, MASON & DIXON LINES, INC.. UNIVERSAL AMCAN LIMITED, ROMEO EXPEDITERS, INC.. TOM THUMB SERVICES. INC., d/b/a RE1, OJ TRANSPORT COMPANY, JLAW ENTERPRISES INC., and OJ TRANSPORT, INC.,
Plaintiffs-Appellants.

and

AMERICAN TRUCKING ASSOCIATION, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs-Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY. DEPARTMENT OF COMMERCE, and the STATE OF MICHIGAN,
Defendants-Appellees.

No. 226053; 226137
Court of Claims
LC No. 95-015631-CM

Before: Markey, P.J., and Saad and Smolenski, JJ.

SMOLENSKI, J.

In this consolidated class action suit, plaintiffs, individual class representative trucking companies, and intervening plaintiffs, two trucking companies, appeal by right from a December 30, 1998 judgment, which granted summary disposition in favor of defendants. We affirm.

I

This case involves the effect of several federal laws, specifically 49 USC § 11501, 49 USC § 11506, and section 601(h) of the Federal Aviation Administration Authorization Act of 1994 ["FAAAA"], on various provisions of Michigan's Motor Carrier Act ["MCA"]. This litigation began on January 3, 1995, when plaintiffs Westlake Transportation, Inc, et al, filed their complaint, and alleged that the $100 annual fees for interstate and intrastate motor carriers were unconstitutional because federal laws, 49 USC § 11506 and 49 USC § 11501, respectively, preempted the state laws. On January 9, 1995, Troy Cab, Inc, et al, filed their complaint, and made similar allegations.

In Michigan, since 1933, motor carrier regulation has been pursuant to the Michigan Motor Carrier Act ["MCA"]. MCL 475.1 *et seq.* The act authorizes the Michigan Public Service Commission ["PSC"] to enforce the act. MCL 475.1(c): MCL 475.2. Under the MCA. motor carriers must pay a fee of $100 for each application filed with the commission for a certificate of authority or for a permit to operate intrastate. MCL 478.1. Also, motor carriers are required to pay an annual fee of $100 per vehicle for the administration of the act. MCL 478.2(1) and (2). Subsection (1) applies to motor carrier vehicles which operate intrastate pursuant to a certificate of authority, while subsection (2) applies to motor carrier vehicles license-plated in Michigan

who engage entirely in interstate commerce.[1] The act also provides that motor carriers which are registered outside Michigan are required to pay a registration fee of $10 per vehicle. MCL 478.7.

In February 1995, intervening plaintiffs filed their complaint, and alleged that the intrastate decal fee violated the Commerce Clause, and were subsequently granted the right to intervene. Plaintiffs Westlake Transportation, Inc, et al, and intervening plaintiffs both amended their complaints, adopting the other's substantive claims. The plaintiffs' cases were consolidated in April 1995 and the classes were certified in June 1995.

On June 22, 1995, plaintiffs fled two separate motions for partial summary disposition pursuant to MCR 2.116(C)(10); one regarding their intrastate preemption claim and the other regarding their interstate preemption claim. On June 30, 1995, intervening plaintiffs fled their motion for partial summary disposition pursuant to MCR 2.116(C)(10), regarding their violation of the Commerce Clause claim. On October 27, 1995, defendants renewed their own motion for summary disposition. The Court of Claims issued its opinion on October 13, 1998, concluding that plaintiffs' and intervening plaintiffs' claims were meritless, and denied their motions for partial summary disposition pursuant to an order entered on November 12, 1998. Subsequently, the court granted defendants' motion for summary disposition "for the reasons defendants stated in their November 10, 1998 supplemental brief," which relied on the court's October 13, 1998 opinion.

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[1] The fees in MCL 478.1 and 478.2(1) will be referred to as the "intrastate fees," and the fee in MCL 478.2(2) will be referred to as the "interstate fee."

The court concluded that section 601 of the FAAAA did not preempt MCL 478.2(1) because the federal law did not preempt safety regulatory fees. The court also found that MCL 478.2(2) was not preempted because the federal law only imposed the $10 maximum on "participating states," not "registration states." The court further determined that MCL 478.2(1) did not implicate the Commerce Clause because it did not more heavily burden foreign motor carriers as compared to Michigan motor carriers engaged in interstate commerce, as the state statute only affects Michigan motor carriers who engage solely in intrastate commerce. Plaintiffs filed a motion for reconsideration, which was denied. Plaintiffs and intervening plaintiffs now appeal by right.

II

Summary disposition of all or part of a claim or defense may be granted when

> [e]xcept as to the amount of damages. there is no genuine issue as to any material fact. and the moving party is entitled to judgment or partial judgment as a matter of lave. [MCR 2.1 16(C)(10).]

A motion for summary disposition under MCR 2.1 1 6(C)(10) tests whether there is factual support for a claim. and is reviewed de novo on appeal. *Spiek v Dept or Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b), *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). All reasonable inferences are to be drawn in favor of the

nonmovant. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618: 537 NW2d 185 (1995).

III

Plaintiffs argue that MCL 478.2(2) is preempted by federal law, specifically 49 USC § 11506.[2] Determining whether federal law preempts a state law presents an issue of statutory construction and is a question of law. *Kohynenbelt v Flagstar Bank*, 242 Mich App 21, 27; 617 NW2d 706 (2000). Congressional intent is the cornerstone of preemption analysis. *Fort Halifax Packing Co v Coyn,*. 482 US 1, 8;107 S Ct 2211; 96 L Ed 2d 1(1987).

The Supremacy Clause of the United States Constitution provides Congress with the power to preempt state law. US Const, art 6, cl 2. A general presumption exists in the law against federal preemption. *Duprey v Huron c Eastern R Co, Inc*, 237 Mich App 662, 665; 604 NW2d 702 (1999). Federal preemption occurs only under certain conditions, such as when (1) Congress enacts a federal statute that expresses a clear intent to preempt state law, (2) an outright or actual conflict exists between federal and state law, (3) compliance with both federal and state law is effectively impossible, (4) an implicit barrier to state regulation exists in federal law, (5) Congress has legislated comprehensively, thereby occupying an entire field and leaving no room for supplemental state law, or (6) the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Id.*

49 USC § 11506 provided, in part,

> (b) General rule.--The requirement of a State that a motor carrier, providing transportation subject to

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[2] This statute is currently codified as 49 USC § 14504; however, we will refer to the law as § 11506.

> jurisdiction under subchapter I of chapter 135 and providing transportation in that State, must register with the State is not an unreasonable burden on transportation referred to in section 13501 when the State registration is completed under standards of the Secretary under subsection (c).
>
> When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden.
>
> (c) Single State registration system.--
>
> (1) In general.--The Secretary shall maintain standards for implementing a system under which--
>
> (A) a motor carrier is required to register annually with only one State by providing evidence of its Federal registration under chapter 139;
>
> (B) the State of registration shall fully comply with standards prescribed under this section; and
>
> (C) such single State registration shall be deemed to satisfy the registration requirements of all other States.
>
> (2) Specific requirements.--
>
> (A) Evidence of Federal registration; proof of insurance; payment of fees.-- Under the standards of the Secretary implementing the single State registration system described in paragraph (1) of this subsection, only a State acting in its capacity as registration State under such single State system may require a motor carrier registered by the Secretary under this part--

(i) to file and maintain evidence of such Federal registration:

(ii) to file satisfactory proof of required insurance or qualification as a self-insurer;

(iii) to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and

(iv) to file the name of a local agent for service of process.

(B) Receipts; fee system.--The standards of the Secretary--

(i) shall require that the registration State issue a receipt, in a form prescribed under the standards, reflecting that the carrier has filed proof of insurance as provided under subparagraph (A)(ii) of this paragraph and has paid fee amounts in accordance with the fee system established under clause (iv) of this subparagraph;

(ii) shall require that copies of the receipt issued under clause (i) of this subparagraph be kept in each of the carrier's commercial motor vehicles:

(iii) shall not require decals. stamps. cab cards, or any other means of registering or identifying specific vehicles operated by the carrier;

(iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that--

(I) is based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates;

(II) minimizes the costs of complying with the registration system; and

(III) results in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15,1991; and

(v) shall not authorize the charging or collection of any fee for filing and maintaining evidence of Federal registration under subparagraph (A)(i) of this paragraph.

(C) Prohibited fees.--The charging or collection of any fee under this section that is not in accordance with the fee system established under subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce.

The MCA only applies to entities engaged in interstate commerce to the extent it is consistent with federal law. MCL 478.12. MCL 478.2(2) provides, in pertinent part, "A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which

is registered in this state and operating entirely in interstate commerce."[3]

Plaintiffs contend that the interstate fee was preempted both before and after the implementation of the Single State Registration System ["SSRS"} on January 1, 1994. With the implementation of the SSRS, § l 1506 was amended and significant language changes were made; We will first address plaintiffs' preemption argument regarding § 11506 after January 1, 1994. However, before we do so, an understanding of the evolution of this federal law is helpful.

Beginning in I965, Congress authorized States to require interstate motor carriers operating within their border to register with the State proof of their Interstate Commerce Commission (ICC) interstate operating permits. Pub L 8u170, 79 Stat 648.49 USC § 302(b)(2) (1970 ed). Congress provided that state registration requirements would not constitute an undue burden on interstate commerce so long as they were consistent with regulations promulgated by the ICC. *Id.*

Prior to 1994, the ICC allowed States to charge interstate motor carriers annual registration fees of up to $10 per vehicle. See 49 CFR § 1023.33 (1992). As proof of registration, participating States would issue a stamp for each of the carrier's vehicles. § 1023.32. The stamp was affixed on a "uniform identification cab car[d]" carried in each vehicle, within the square bearing the name of the issuing State. § 1023.32(d)-(e). This system came to be known as the "bingo card" system. *Single-State Insurance Registration*, 9 ICC 2d 610, 610 (1993).

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[3] The subsection also provides that the fee is only $50 if the motor carrier begins operations after June 30th of the year. The other provisions in the subsection are not at issue in this appeal.

The "bingo card" regime proved unsatisfactory to many who felt that the administrative burdens it placed on carriers and participating States, outweighed the benefits to those States and to the public. HR Rep No 102-171, pt l, 49 (1991); HR Conf Rep No 102-404, 437-438 (1991); US Code Cong & Admin News 1991, 1526, l 679: In the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Congress therefore directed the ICC to implement a new system to replace the "bingo card" regime.[4] See Pub L 102-240, § 4005, 105 Stat 1914, 49 USC § l 1506(c) (1994 ed). Under the new system, called the Single State Registration System, "a motor carrier [would be] required to register annually with only one State," and "such single State registration [would] be deemed to satisfy the registration requirements of all other States." §§ 11506(c)(1)(A) and (C). Thus, one State would--on behalf of all other participating States--register a carrier's vehicles, file and maintain paperwork, and collect and distribute registration fees. § 11506(c)(2)(A). Participation in the Single State Registration System was limited to those States that had elected to participate in the "bingo card" system. § I I506(c)(2)(D).

ISTEA also capped the per-vehicle registration fee that participating States could charge interstate motor carriers. Congress directed the ICC to "establish a fee system ... that

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[4] Congress abolished the ICC in 1995 and assigned responsibility for administering the new Single State Registration System to the Secretary of Transportation. See ICC Termination Act of 1995, Pub L 104-88, § 101, 109 Stat 803. The provisions of ISTEA governing the system were amended and recodified. See 49 USC § 14504(c). The Federal Highway Administration, under the Secretary of Transportation, adopted the ICC regulations that implemented the Single State Registration System, 61 Fed Reg 54706, 54707 (1996), and the Federal Motor Carrier Safety Administration now has authority to administer the system, 49 USC § 113(0(1).

(I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates. (11) will minimize the costs of complying with the registration system, and (111) will result in a fee for each participating State that is equal to the fee, not to exceed 510 per vehicle, that such State collected or charged as of November 15, 1991." § 1 I506(c)(2)(B)(iv). Congress provided that the charging or collection of any fee not in accordance with the ICUs fee system would "be deemed to be a burden on interstate commerce." § 11506(c)(2)(C). [*Yellow Transportation, Inc v Michigan*, US :123 S Ct 371, 374-375:154 L Ed 2d 377 (2002).]

A

Plaintiffs argue that the federal statutory language is clear, a state may charge a maximum registration fee of $10 per vehicle to motor carriers engaged in interstate commerce, regardless of whether a motor carrier is registered in Michigan or another state. Plaintiff acknowledges that MCL 478.7 reflects the mandate of § 11506 with regards to out-of-state registered motor carriers,[5] and asserts that Michigan registered motor carriers are required to be charged similarly.

Defendants' counter-argument is two-fold. First, § 11506 only applies to registration fees, not regulatory fees, and the interstate fee at issue is a regulatory fee. Second, the fee limit in § 11506 only applies to participating states, not the

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[5] MCL 478.7 provides, in part,

(4) The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00. The commission may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection.

registration state. The court agreed with defendants' argument, and granted summary disposition on this issue for the same reasons. Therefore, the key questions are (1) to whom does the fee limit in § 11506 apply, and (2) to what type of fees. The answers to these questions can be found in the language of the statute itself and the federal regulations which interpret it.

It is not an unreasonable burden on interstate commerce to require vehicles to register with a state; however, any state registration requirements which are in excess of the standards in § 11506(c) are considered an unreasonable burden. § 11506(b). Under the SSRS, a motor carrier is required to register annually with only one state, and that registration satisfies the registration requirements of all the states. § 11506(c)(1)(A). A motor carrier may only register with a participating state, a state which participated in the old "bingo card" system. § 11506(c)(2)(D). The motor carrier must register with the state where its principal place of business is located, if it is a participating state, or else register with the participating state in which it operates the most vehicles. 49 CFR 367.3.[6] Therefore, a registration state, the state in which a motor carrier registers, is by definition a participating state. Michigan is a participating state, *Yellow Transportation, supra* at 376. and. therefore, can be a registration state.

The registration state may require a motor carrier to (l) file proof of its federal registration [ICC permit), (2) file proof of insurance, (3) file the name of its agent for service of process, and (4) pay a fee. § 11506(c)(2)(A). The registration state is then to issue the motor carrier a receipt, reflecting that proof of insurance was filed and that the fee was paid, a copy of which is to be kept in the carrier's vehicles. § 11506(c)(2)(B). The fee is for the filing of the

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[6] 49 CFR 1023.1 *et seq* was recodified as 49 CFR 367.1 *et seq*.

proof: of insurance, and may not be charged for the filing of the motor carrier's ICC permit. §11506(c)(2)(B)(iv) and (v).

In support of the registration fee, the motor carrier must file with the registration state a form which delineates (l) the number of vehicles it intends to operate in each participating state, (2) the per vehicle fee each participating state charges, (3) the total fee due each participating state, and (4) the total of all the fees due. 49 CFR 367.4(c)(4). The per vehicle fee each participating state is allowed to charge is equal to the amount the state charged or collected as of November 15, 1991, not to exceed $10. § 11506(c)(2)(B)(iv)(III): 49 CFR 367.4(c)(4)(ii). Congress wanted to "minimize[] the cost of complying with the registration system" for the motor carriers, § 11506(c)(2)(B)(iv)(II), while at the same time preserving "revenues for the states which had participated in the bingo program," HR Conf Rep No 102-404, reprinted in 1991 USCCAN 1817. The fees a registration state collects on behalf of other participating states are remitted to those states monthly. 49 CFR 367.6. Thus, if a motor carrier registered in Michigan, it would first list the number of vehicles it operated in each participating state. Because Michigan is a participating state, it would need to list the number of vehicles it operated in Michigan. The fee Michigan could charge can not exceed $10.

We find that the statutory language and its accompanying federal regulations are clear. A registration state is simply a participating state in which a motor carrier is registering. Therefore, when the statute states that a participating state may not charge a fee in excess of $10, this includes the registration state. To conclude otherwise, that a registration state could set its own fee, would contravene the express language and purpose of the statute.

The next question is whether the $100 fee in MCL 478.2(2) is a registration fee, such that it is subject to the limitation in § 11506, or a regulatory fee. Plaintiffs assert that

the fee is for all practical purposes a registration fee. Because the fee must be paid at the time a motor carrier registers with a state, and in return for the fee receives an identification decal, plaintiffs contend that one can only conclude that the fee is, in actuality, a registration fee. We disagree. Faced with a similar situation in *Franks & Sons, Inc v. Washington*, 966 P2d 1232, 1243 (Wash 1998), the Washington Supreme Court rejected the plaintiffs' argument that because the regulatory fee and federal identification fee were collected at the same time, an unlawful registration requirement resulted. The Court adeptly stated, "We believe a more realistic rationale for concurrent collection of the two fees was administrative convenience and efficiency." *Id.*

We find that the $100 interstate fee could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of the MCA, particularly covering costs of enforcing safety regulations.[7] If a fee's purpose is to regulate an industry or service, it can be properly classified as a regulatory fee. *Bolt v City of Lansing*, 459 Mich 152, 161-162; 587 NW2d 264 (1998). Because the fee in MCL 487.2(2) is not a registration fee, it is not subject to preemption by 49 USC § 11506.

Plaintiff argues that the federal law prohibits construing the fee as a regulatory fee, citing *Roadway Express, Inc v. State Treasurer*, 458 NE2d 66 (Ill Ct App 1983). That case involved a $31 registration fee Illinois charged Ohio motor carriers. *Id.* at 68. At the time, the federal regulation allowed

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[7] Because Michigan plated vehicles which operate solely interstate are required to pay the $100 regulatory fee, the PSC waives the registration fee. *Schneider Nat'l Carriers, inc v Michigan (On Remand)*, 247 Mich App 716, 721; 637 NW2d 838 (2001). Hence, the registration fee Michigan charges for vehicles plated in Michigan is $0, less than the $10 limit imposed by § 11506. Therefore, the registration fee is within the federal mandate.

a maximum registration fee of $5 plus an additional reasonable fee imposed to defray the cost of the regulation of carriers within the state's borders. Id. at 69. Plaintiff contends that *Roadway Express* "issued a warning" that "no such additional 'regulatory fee' was permissible after 1981" because the federal regulation interpreting § 11506 was amended in 1981 and set an absolute limit of $10 for identification fees. However, *Roadway Express* issued no such warning. The court merely noted "again parenthetically." that the federal regulation, 49 CFR 1023.33 (redesignated). was amended and set the limit at $10. *Roadway Express, supra* at 69.

Plaintiffs appear to argue that because the amended federal regulation did not explicitly provide for an additional fee, that one was hence prohibited. However, plaintiffs provide no support for their argument. Further, plaintiffs fail to recognize the import of two other regulations in existence at the time. 49 CFR 1023.105 (1991) (superseded) provided that the rules and regulations were not to be construed to affect the collection of taxes or fees by a state from motor carrier for the operation of vehicles within the borders of a state. 49 CFR 1023.104 (1991) (superseded) provided that states were "urged" to use fees collected for the purpose of defraying the cost of regulation of motor carrier within their borders. Therefore, the ability of a state to collect fees in addition to the registration fees was not affected by the removal of the language providing for additional fees from § 1023.33.[8]

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[8] We note that the substance of 49 CFR 1023.104 and 1023.105 were not included in the 1994 amendments, 49 CFR 1023.1-1023.6. However, neither was there any express prohibition on state imposed regulatory fees. The statute and its regulations only address registration requirements. Because there is a presumption against federal preemption, we believe that Congress' silence cannot be interpreted as prohibiting state regulatory fees, see

B

Plaintiffs also argue that the interstate fee was prohibited before the creation of the SSRS in 1994, under the previous version of § 11506. Plaintiffs assert this argument because their complaint was filed in the beginning of 1995, and with a three-year statute of limitations, plaintiffs contend that they are entitled to a refund for the excess fees they have paid since 1992.

Before the 1994 enactment of the SSRS, § 11506 read, in pertinent part,

> (b) The requirement of a State that a motor carrier ... register the certificate or permit issued to the carrier under section 10922 or 10923 of this title is not an unreasonable burden on transportation referred to in section 10521(a)(I) and (2) of this title when the registration is completed under standards of the Commission under subsection (c) of this section. When a State registration requirement imposes obligations in excess of the standards, the part in excess is an unreasonable burden.
>
> (c)(1) The Commission shall maintain standards and amendments to standards (A) prepared and certified to it by the national organization of the State Commissions, and (B) prescribed by the Commission... .

The Commission prescribed the following interpretive regulation:

The application for the issuance of such identification stamps or number shall .. . be duly completed and executed

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Wisconsin Pub Intervenor v Mortier, 501 US 597, 607; 111 S Ct 2476; 115 L Ed 2d 532 (1991), particularly given that regulatory and registration fees can co-exist in the same field without conflicting, *Duprey, supra* at 665.

by an official of the motor carrier, and shall be accompanied by the fee, if any, proscribed by the law of such State; provided, however. that such fee shall not exceed $l0 for the issuance of each such identification stamp; and provided further (when the State Commission assigns an identification number in lieu of issuing an identification stamp or stamps), that such fee shall not exceed $10 for each vehicle operated under the authority of the motor carrier identified in the cab card bearing such identification number. [49 CFR 1023.33 (superseded).]

The pre-1994 federal regulation substantively mirrored §11506(c) as amended in 1994. Because we concluded above that the interstate fee is a regulatory fee, it is outside the scope of the federal law and was not preempted.[9] Accordingly, the court did not err in granting defendants' summary disposition.

IV

In their complaints, plaintiffs and intervening plaintiffs allege that the intrastate fees in MCL 478.1 and MCL 478.2(1) were preempted by § 601 of the FAAAA. Section 601(h), which became effective on January 1, 1995, prohibited state regulation of price, route or service of motor carriers, save for a few delineated exceptions. [currently codified as] 49 USC § 14501(c).

Plaintiffs argue that the court erred in granting defendants' summary disposition on this issue before

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[9] We note that the cases from other jurisdictions that plaintiffs cite are inapplicable in this case. The conclusion in this case turns on whether the interstate fee is classified as a regulatory fee or a registration fee. In the cases plaintiffs cite, there was no disagreement that the fee at issue was a registration fee.

discovery was complete.[10] Plaintiffs assert that they should have been allowed an opportunity to conduct additional discovery in order to show that, as utilized. the intrastate fees are prohibited by federal law.

In re Motor Carrier Act, 223 Mich App 288.302; 566 NW2d 299 (1997), held that § 601 did not preempt the entire MCA and did not indicate an intent to preempt fee provisions such as MCL 478.1 and MCL 478.2. The Court noted that in response to the enactment of the FAAAA, the PSC "issued considered decisions that indicated how its regulation of the trucking industry in Michigan was affected by federal legislation preempting at least some aspects of state regulation." *Id.* at 300. In regards to the fee provisions at issue, the Court stated,

> The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL § 479.41; MSA § 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL § 478.1; MSA § 22.560, for protesting an application for a certificate. MCL § 478.1a; MSA § 22.560(1), and for administering the act, MCL § 478.2(1): MSA § 22.561(1), are unaffected by the preemptive effect of § 601. In fact, *because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules.* Indeed, appellants Central Transport and Universal Am-Can have not shown that the cost of the PSC's operations has ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now

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[10] We note that plaintiffs do not contest the court's summary disposition ruling, that § 601 did not preempt the intrastate fees.

preempted economic regulation. [*Id.* at 302-303; emphasis added.]

Plaintiffs contend that the PSC intrastate fees were being used to fund preempted portions of the MCA, and, thus, the fees were related to a preempted provision. Therefore, the fees were also preempted. Plaintiffs did not submit any documentary evidence below in support of this contention. Plaintiffs argue that they had intended to do so, but their opportunity was foreclosed when the court denied their motion for partial stay and bifurcation of issues. Plaintiffs requested a 90 to 120-day stay in the proceedings to conduct discovery in order to present a factual record to the court in a supplemental brief in response to the decision in *In re Motor Carrier Act, supra*; however, the court denied the motion without prejudice because it believed its summary disposition ruling would cover the issue.

A court's decision regarding matters of discovery is reviewed on appeal for an abuse of discretion. *In re Pott*, 234 Mich App 369, 373; 593 NW2d 685 (1999). Plaintiffs could not address this Court's decision in *In re Motor Carrier Act, supra*, in their original motion for partial summary disposition because they were filed and argued in 1995, and the case was not decided until April 25, 1997. However, plaintiffs did not file their motion for partial stay and bifurcation of issues until March 1998, nearly one year later. The record indicates that plaintiffs were conducting discovery during this entire time, yet never sought evidence relating to this issue.

We find that plaintiffs had ample opportunity to conduct discovery following the decision in *In re Motor Carrier Act, supra*, and file a supplemental brief containing their findings. Given that one year had passed, we also find that there is no reason to believe that had plaintiffs been given another three or four months in which to conduct discovery, plaintiffs would have uncovered a factual basis for their claim.

Furthermore, we note that by stipulation, discovery was to be completed 180 days after the court issued its ruling on the parties' motions for summary disposition.

Plaintiffs assert in their reply brief that they are not arguing that they were prevented from conducting discovery, but that they were denied an opportunity to supplement their motion papers. However, the court did not foreclose plaintiffs' opportunity to present their argument. They could have filed additional briefs at any time before the court issued its ruling. In fact, on January 28, 1998, plaintiffs filed a supplemental brief in support of their motions for summary disposition and in opposition to defendants' motion, in which it specifically mentioned *In re Motor Carrier Act, supra*. This indicates plaintiffs were well aware of the import of the case. and could have conducted discovery and presented their argument accordingly. Plaintiffs mention that defendants did not submit the opinion as authority until January 1998. However, *In re Motor Carrier Act* was decided in April 1997, and nothing prevented plaintiffs from proactively distinguishing their case from it.

Moreover, the court specifically invited plaintiffs to present their argument again if they felt its ruling did not adequately cover the issue. Plaintiffs did file a motion for reconsideration after the court issued its orders on the parties' motions for summary disposition, yet did not reraise this issue. We recognize that plaintiffs' renewed their motion to stay on October 8, 1998; however, this was before the court issued its ruling. Because the court had not yet issued its ruling, plaintiffs could have attempted to conduct discovery after its first motion was denied.

Therefore, we conclude that the court did not abuse its discretion in denying plaintiffs' request to stay the proceedings in order to conduct additional discovery. A decision of a court which obtained the correct result, albeit

for a different reason, will be affirmed on appeal. *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001).

V

Plaintiffs Troy Cab, *et al* allege, that the intrastate fees in MCL 478.1 and MCL 478.2(1) are unconstitutional taxes in violation of various sections of the Michigan constitution. The fees at issue are credited to the PSC. MCL 478.6. Whether a charge is a permissible fee or an illegal tax is a question of law. *Bolt, supra* at 158. A court's factual findings are reviewed for clear error. A finding is clearly erroneous when, although there is evidence to support it, upon reviewing the entire record, the appellate court is left with a definite and firm conviction that a mistake was made. *Christiansen v Gerrish Twp.* 239 Mich App 380, 387; 608 NW2d 83 (2000).

In determining whether a charge imposed by a unit of government is a fee or a tax, a court must consider: (1) whether the charge serves a regulatory purpose rather than operates as a means of raising revenue; (2) whether the charge is proportionate to the necessary costs of the service to which it is related: and (3) whether the payor has the ability to refuse or limit its use of the service to which the charge is related. *Bolt, supra* at 161-162. These factors should be considered in their totality, and a weakness in one area does not mandate a particular finding. *Id.* at 167; *Graham v Kochville Twp.* 236 Mich App 141,151; 599 NW2d 793 (1999).

Taxes have a primary purpose of raising revenue, while fees are usually in exchange for a service rendered or a benefit conferred. *Bolt, supra* at 162. The stated purpose of the intrastate fees is for "the administration of the [MCA]." MCL 478.1; MCL 478.2(1). The express purposes of the act are

> to confer upon the [PSC] the power and authority and to make it its duty to supervise and regulate the

> transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to: (a) Relieve all future undue burdens and congestion on the highways arising by reason of the use of the highways by motor vehicles operated by motor carriers; (b) protect and conserve the highways and protect the safety and welfare of the traveling and shipping public in their use of the highways; (c) promote competitive and efficient transportation services; (d) meet the needs of motor carriers, shippers, receivers, and consumers; (e) allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; (h) promote intermodal transportation; (i) prevent unjust discrimination; (j) promote greater participation by minorities in the motor carrier system; (k) provide and maintain service to small communities and small shippers; (l) prevent evasion of this act through any device or arrangement; (m) promote entrepreneurship in the motor carrier industry by allowing greater contract carrier economic and entry flexibility; and (n) promote the use of jointly considered and initiated rates, classifications, divisions, allowances, charges, or rules of motor carriers under commission approved agreements. [MCL 475.2.][11]

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[11] Any purposes which related to economic regulation were preempted by § 601 of the FAAAA as of January 1, 1995, and the PSC ceased to enforce those regulations. *In re Motor Carrier Act, supra* at 300. However, the legislature has yet to amend the MCA to reflect the federal preemption.

This language indicates the exactions are regulatory.

Taxes are designed to raise revenue for the general public, while a fee "confers benefits only upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee." *Graham, supra* at 151. In this case, in exchange for the fees, a motor carrier receives the right to operate its trucks in Michigan, and the fees are used to enforce the provisions of the act which carry out the above-listed purposes. Thus, there is a direct benefit to the one who pays the fees. We recognize that promoting and regulating safe use of the highways benefits the general public as well. However, a regulatory fee can have dual purposes and still maintain its regulatory characterization. As long as the primary purpose of a fee is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose, *Graham, supra* at 151, and thus benefit the general public.

Plaintiffs argument focuses on the second prong of the test, whether the fees are proportional to the cost of the services to which they relate. Plaintiffs assert that in 1982, when the fees were increased,[12] they became taxes because the amounts collected were in excess of the services' expenses. A fee must be proportionate to the cost of the regulation, but its amount is presumed reasonable unless its unreasonableness is established. *Graham, supra* at 151. "[W]here revenue generated by a 'regulatory fee' exceeds the cost of regulation, the 'fee' is actually a tax in disguise." *Gorney v City of Madison Heights*, 211 Mich App 265. 268; 535 NW2d 263 (1995).

In support of their contention, plaintiffs presented two affidavits and a senate fiscal report. We find the affidavits of

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[12] 1982 PA 399 raised the fees in MCL 478.1 and MCL 478.2(1) to their current levels.

minimal value in determining whether the fees are unreasonable. Neither of the affiants worked for the PSC and could only offer their opinion as to how the fees were spent. The senate fiscal report, created by a senate fiscal analyst, showed how the funds received by the PSC were utilized for fiscal years 1982-1983 to 1994-1995,[13] and one of the charts showed that there was a surplus nearly every year.[14]

However, defendants dispute the accuracy of the figures in the report. Defendants note that charts reflect the total fees collected, not just the fees collected pursuant to MCL 478.1 and MCL 478.2(1) and defendants confirmed with the report's author that appropriations to the Michigan Truck Safety Fund were not considered. Therefore, defendants contend that the excess amounts were distorted.

It is clear that the report on which plaintiffs rely included all fee revenues without excluding non-challenged interstate

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[13] Plaintiffs also assert that the report shows that the fees supported activities not related to the regulation of motor carriers as a portion was allocated to the State Police, Department of Commerce, and Department of Civil Service. However, it is the duty of the police to assist the PSC in enforcement of the MCA, MCL 479.13, and the Department of Commerce provides administrative support to the PSC which enables it to carry out its duties. It follows that the PSC would allocate a portion of the fees to them. In addition, the allocation of a very small portion of the PSC's revenues to the Department of Civil Service is mandated by the legislature in accordance with the constitution to fund the civil service. 1963 Const, art 11, § 5. The allocations to this department averaged only $23,000 each year when revenues ranged from $3.2 to $6.3 million.

[14] Plaintiffs present no evidence as to the proportionality of the fees after 1995, when the PSC ceased any economic regulatory functions as mandated by section 601 of the FAAAA. Therefore, we have no basis on which to determine the fees' proportionality after 1995.

fees collected pursuant to the SSRS and its predecessor system. Therefore, the surplus figures were distorted to some degree. Even without reducing the surplus figures, the aggregate excess during the thirteen years was only 1 I.7%, a relatively small percentage. The test is whether the fee is proportional, not whether it is equal, to the amount required to support the services it regulates. *Graham, supra* at 151. We conclude that the trial court did not clearly err in finding that the fees were not "wholly disproportionate."

Lastly, plaintiffs argue that the exaction is not voluntary because without paying it, a motor carrier cannot operate its trucks in Michigan. Defendants argue that a motor carrier has a choice as to what extent its trucks will have a presence in Michigan, and. therefore, the exaction is voluntary. While this is true in regards to the application fee, MCL 478.1, defendants' logic is erroneous in regards to the administration fee. MCL 478.2(1), because every vehicle plated in Michigan must pay this fee irrespective of where it operates. Even if we were to view the exaction as more compulsory than voluntary. when the totality of factors are considered, we believe the exactions are most properly classified as regulatory fees. Bolt, supra at 167; *Graham, supra* at 151. Therefore, the court did not err in granting defendants' summary disposition on this issue.

VI

Plaintiffs next argue that the intrastate and interstate fees violate the equal protection clause of the United States and Michigan Constitutions because they only apply to "for hire" motor carriers and not to private motor carriers.[15] Both the federal and state constitutions guarantee equal protection, and

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[15] Because we concluded that the fees are regulatory, plaintiffs additional argument, that the fees violate Michigan's Uniform Taxation Clause, is without merit.

afford similar protection. Const 1963, art l, § 2; US Const, Am 14, § 1; *Vargo v Sauer*, 457 Mich 49, 60; 576 NW2d 656 (1998). A court's ruling whether a statute violates equal protection is a question of law. *McDougall v Schanz*, 461 Mich .1 5, 24; 597 NW2d 148 (1999).

Legislative classifications which do not implicate a fundamental right or target a suspect class are presumed to be constitutional if they have a rational basis, and one who challenges such a statute has the burden of showing that it bears no rational relation to some independent and legitimate legislative end. *TIG Ins Co, Inc v Dept of Treasury*, 464 Mich 548, 557; 629 NW2d 402 (2001); Vargo, supra at 60. Under the rational basis test, a statute will ordinarily be sustained if it can be said to advance a legitimate governmental interest, even if the law seems to be unwise or works to the disadvantage of a particular group, or if the rationale seems to be tenuous. *People v Copper (After Remand)*, 220 Mich App 368, 372-373; 559 NW2d 90 (1996). A legislative classification may not be set aside if any set of facts may reasonably be conceived to justify it. *Id.* at 373.

Before 1994, the fees were used to fund the economic and safety regulation of motor carriers. Motor carriers do not include private carriers. MCL 475.1(i). A private carrier is "any person engaged in the transportation of property by motor vehicle upon public highways where the transportation is incidental to, or in furtherance of, any commercial enterprise of the person, other than transportation." MCL 475.1(q). A "for hire" motor carrier is one which receives "remuneration or reward of any kind, paid or promised, either directly or indirectly." MCL 475.1(e). Thus, "for hire" motor carriers are engaged in the business of transportation.

The rationale behind the classification distinction may be supported by facts either known or reasonably assumed, even if those facts may be debatable. *TIG Ins, supra* at 557, citing

Crego v Coleman, 463 Mich 248, 259-260; 615 NW2d 218 (2000). We believe it is reasonable to assume that such carriers have larger fleets than private carriers, operate under competitive pressures, and operate more frequently than private carriers. We can surmise that these carriers are in need of being more closely scrutinized in order to protect the general public which also uses the public highways; thus, the need for regulations and fees to cover their enforcement.

Even after economic regulation of the motor carriers ceased, as *In re Motor carrier Act, supra* at 301, recognized, the PSC "still had significant regulatory obligations," including supervising and regulating the safety of motor carrier operations, as well as the certification process. Therefore, the need for fees to support such regulations were not eliminated after the FAAAA was enacted. The same concerns as before still existed. Accordingly, we conclude that the legislature's classification bore a rational relation to a legitimate state purpose, and the court did not err in granting defendants' summary disposition.

VII

Finally, intervening plaintiffs argue that the intrastate fee imposed by MCL 478.2(1) violates the Commerce Clause because it burdens interstate commerce. Again, we disagree, but for a different reason than stated by the trial court.

The Commerce Clause provides that Congress "shall have power ... [t]o regulate commerce ... among the several states." US Const, art I, § 8, cl 3. The "dormant Commerce Clause" denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, inc v Dept of Environmental Quality of the State of Oregon*, 511 US 93, 98;114 S Ct 1345;128 L Ed 2d 13 (1994).

The trial court held that the Commerce Clause was not implicated because the fee only applied to intrastate carriers. However, any tax or regulation which effects interstate

travel, even if imposed solely on intrastate commerce, is subject to Commerce Clause analysis. *Citizens for Logical Alternatives & Responsible Environment, Inc v Clare Co Bd of Comm'rs*, 211 Mich App 494, 499; 536 NW2d 286 (1995). Because the fee is imposed on any vehicle which operates intrastate pursuant to a certificate of authority, even if it also travels interstate, the fee affects interstate commerce, and thus, implicates the dormant Commerce Clause. Although the trial court did not address this issue, our review is nevertheless proper because whether a statute violates the Commerce Clause is a question of law. *Gillette Co v Dept of Treasury*, 198 Mich App 303, 311; 497 NW2d 595 (1993).

"A statute is presumed constitutional absent a clear showing to the contrary." *Caterpillar, Inc v Dept of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992). The test for determining whether a regulatory fee violates the Commerce Clause involves a two-tiered approach.[16] The first step is to determine whether the statute discriminates against interstate interests or merely regulates evenhandedly with only incidental effects upon interstate commerce. *Oregon Waste, supra* at 99. "[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the loaner and burdens the latter. *Id.* The United States Supreme Court has recognized that there is no clear line separating the two categories. The critical consideration is the overall effect of the statute on both local and interstate activity. *Brown-Forman Distillers Corp v New*

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[16] Intervening plaintiffs contend that the four-prong test enunciated in *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977), and utilized in *American Trucking Ass'n v Schemer*, 483 US 266, 283; 107 S Ct 2829; 97 L Ed 2d 226 (1987), is applicable. However, this test is used to analyze the constitutionality of state taxation statutes which tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, *Complete Auto, supra* at 279, not regulatory statutes.

York State Liquor Authority, 476 US 573, 579; 106 S Ct 2080; 90 L Ed 2d 552 (1986). A state law will be invalidated if it "discriminates against an article of commerce by reason of its origin or destination out of State." *C & A Carbone, Inc v Town of Clarkston, NY*, 511 US 383.390; 114 S Ct 1677; 128 L Ed 2d 399 (1994).

In making this determination, we must consider all the provisions of the challenged statute. MCL 478.2(1) requires that motor carriers which are plated in Michigan and travel solely intrastate or travel both intrastate and interstate, a "mixed" carrier, must pay a fee of $100 per vehicle. MCL 478.2(2) requires that motor carriers which are plated in Michigan and travel solely interstate must also pay the $100 fee. Therefore, the regulatory fee is the same for all motor carriers plated in Michigan, regardless of their final destination. It does not directly regulate interstate commerce, *Pike v Bruce Church, Inc*, 397 US 137, 142; 90 S Ct 844; 25 L Ed 2d 174 (1970), nor is economic protectionism at issue, *Arkansas Electric Co-op Corp v Arkansas Pub Service Comm*, 461 US 375, 394;103 S Ct 1905; 76 L Ed 2d 1 (1983).

Defendants assert that the majority of vehicles which pay the fee operate solely intrastate, which presumably leads to their conclusion that the impact on interstate commerce is minimal. However, the number of interstate vehicles burdened is inconsequential to a finding of discrimination. *New Energy Co v Limbach*, 486 US 269, 276-277; 108 S Ct 1803; 100 L Ed 2d 302 (1988).

Intervening plaintiffs argue that the mixed carrier invariably will pay a higher per mile fee than the carrier who operates solely intrastate. They assert that because the fee is a flat annual fee, in order to receive the greatest benefit for the fee, a carrier would need to maximize its intrastate operations and this could potentially affect a carrier's economic decision-making by discouraging an intrastate carrier from engaging in interstate commerce.

While this may be so, it is a matter of pure speculation. Intervening plaintiffs present no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could occur in the hypothetical. Only one affidavit was submitted by intervening plaintiffs, in which James Crozier, Manager of Licensing and Fuel for intervening plaintiff TNT Holland Motor Express, Inc, stated that mixed carriers often top off their interstate loads with intrastate hauls or transport intrastate loads in between interstate hauls. However, he never averred that this was only done because of the fee imposed by MCL 478.2(1). Regardless of the $100 fee, topping off loads or adding intrastate hauls in between interstate ones is an economically efficient decision for the motor carriers. We do not find that the fee raises a significant barrier to participation in interstate trade. Any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination.

Having concluded that the statute regulates even-handedly, it will be upheld unless the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike, supra* at 142. Intervening plaintiffs do not contest that the statute serves a legitimate non-discriminatory purpose, i.e., funding safety and related regulations. This is an exercise of the State's police power and serves a critical function in protecting the people who use Michigan's highways. Great deference is given to state legislation in the field of highway safety regulation and a strong presumption in favor of its validity exists. *Raymond Motor Transportation, Inc v Rice*, 434 US 429, 443; 98 S Ct 787; 54 L Ed 2d 664 (1978). Based on the record before us, we cannot say that the burden imposed on interstate commerce by the $ 100 annual fee is clearly excessive in relation to Michigan's substantial interest regulating safety on its highways. Therefore, we hold that MCL 478.2(1) does not violate the Commerce Clause. Accordingly, we affirm the trial court's summary disposition ruling in favor of

defendants even though it reached its decision for the wrong reason. *Lavey, supra* at 250.

Affirmed.

/s/ Michael R. Smolenski
/s/ Jane E. Markey
/s/ Henry William Saad

APPENDIX B

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al.,
Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC.
and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, et al.,
Defendants.

No. 95-15628-CM

TROY CAB, INC., et al.,
Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC.
and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs,

v.

STATE OF MICHIGAN, et al.,
Defendants.

No. 95-15631-CM

Opinion

Before the Court in these consolidated class actions are three motions for partial summary disposition brought by Plaintiffs and Intervening Plaintiffs. All Plaintiffs collectively challenge the constitutionality and lawfulness of

certain fees imposed on the trucking industry by Michigan statutes as administered by the Public Service Commission. The constitutional challenges are brought under both the federal and state constitutions, although those brought under Michigan fundamental law are not the subject of these motions. The nonconstitutional claims are predicated on federal statute and assert that the challenged fees violate such supreme law and thus must be enjoined.

The fees here challenged are mandated by Michigan's Motor Carrier Act (MCA or Act), 1933 PA 254 as amended, MCL 475.1, *et seq;* MSA 22.531, *et seq*. They are three in number and are delineated in two sections of article IV of the Act.

First there is the intrastate authority fee of $100.00 required when submitting to the Public Service Commission (PSC or Commission) an application for a certificate of authority or a permit, whether granted or not. That application fee is authorized by article IV, section 1 of the Act, MCL 478.1; MSA 22.560.

Second, section 2 of article IV, MCL 478.2; MSA 22.561, mandates annual fees of $100.00 for each motor vehicle operated by a motor carrier. Subsection (1) applies that requirement "for the administration of this act" to each vehicle used in intrastate service. Subsection (2) makes the same requirement applicable to each vehicle "registered in this state and operating entirely in interstate commerce" by a "motor carrier licensed in this state."

According to Plaintiffs, all three fees are unlawful because they, and especially the intrastate vehicle fee authorized by section 2(1), have been preempted by federal law. Further, they assert that the section 2(2) fee on each Michigan-registered vehicle operated entirely in interstate commerce by a Michigan-licensed motor carrier contravenes another provision of federal law that created the Single State Registration System for motor carriers in interstate

commerce. Finally, they complain also that the section 2(1) fee imposed on vehicles operated in intrastate service offends the dormant Commerce Clause of the United States Constitution by discriminating against foreign motor carriers operating substantially in interstate commerce. The Court will treat each claim in order, beginning with that on which Plaintiffs, primarily rely.

FEDERAL PREEMPTION

Federal preemption has its origin in the Supremacy Clause of US Const, art VI, which declares that the laws of the United States "shall be the supreme Law of the Land." However, federal provisions that invalidate state law must be narrowly tailored to support a presumption against preemption of state law. *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997). State police powers are not superseded by federal provisions unless that is the clear and unequivocal intent of Congress. *Id.* This is especially true of state regulation of matters related to health and safety. *Id.* The plain meaning of federal provisions must be given effect unless there is reason to think Congress intended a more restrictive reading. *Id*, p 28. Courts must seek the congressional intent from the text, structure and purpose of the federal provision as a whole. *Id.* Such considerations include "'the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.'" *Id*, quoting *Medtronic, Inc v Lohr*, 518 US ___; 116 S Ct 2240, 2251; 135 L Ed 2d 700 (1996).

The Federal Aviation Administration Authorization Act of 1994 (FAAAA), PL 103-305, contains § 601, which added subsection (h), "Preemption of State economic regulation of motor carriers," to 49 U.S.C. 11501, subsequently recodified as 49 U.S.C. 14501.[1] By virtue of § 601, effective January 1,

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[1] The entirely of this preemption provision is quoted in *In re Federal Preemption of Provisions of the Motor Carrier Act*, 223

1995, the FAAAA preempts state economic regulation of motor carriers by providing that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier… or any motor private carrier with respect to the transportation of property." 49 U.S.C. 11501(h)(1), now recodified as 49 U.S.C. 14501(c)(1). Such language clearly and expressly prohibits a state from enacting or enforcing laws related to economic aspects of the service provided by a motor carrier. See *'Fitzpatrick v Simmons Airlines, Inc.*, 218 Mich App 689, 691; 555 NW2d 479 (1996). The question then becomes whether Michigan's MCA is a law related to the price, route or service of a motor carrier. *Id.*

In *Morales v Trans World Airlines, Inc.*, 504 US 374, 383; 112 S. Ct 2031; 119 L Ed 2d 157 (1992), the United States Supreme Court concluded that, as used in a similar statute respecting the service of air carriers, the phrase "relating to" expressed a broad preemptive congressional purpose. See *In re Federal Preemption of Provisions of the Motor Carrier Act*, 223 Mich App 288, 300-301; 566 NW2d 299 (1997), lv den 458 Mich 852 (1998); *Fitzpatrick*, supra. *Morales*, p 384, determined that state laws having a "connection with" or "reference to" airline services were "related to" the federal act for purposes of preemption. See *Fitzpatrick*, p 692. Indeed, *Morales*, p 386, rejected the view that the federal act's preemptive scope is limited to state laws specifically addressed to the air carrier industry, ruling instead that a state law may be preempted even if it is not designed to affect the area of preemption or its effect on that area is only indirect.[2] *Morales* held, p 391, that a state law

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Mich App 288, 293-294; 566 NW2d 299 (1997), lv den 458 Mich 852 (1998).

[2] On the other hand, *Morales*, p390, left room for state actions "too tenuous, remote, or peripheral" to have preemptive effect –

requiring truth-in-advertising of air fares was related to the price and service of carriers and was therefore preempted by the federal act. Accord *American Airlines, Inc. v Wolens*, 513 US 219; 115 S Ct 817; 130 L Ed 2d 715, 724-725 (1995); state consumer fraud law is preempted where applied to rates and services of airline frequent-flyer programs. Thus, the *Fitzpatrick* court held, supra, that fidelity to the broad interpretation rendered by the United States Supreme Court in *Morales* required the conclusion that judicial enforcement of the Michigan Civil Rights Act to protect against employment discrimination in the air carrier industry was likewise preempted.[3]

If federal legislation preempts some applications of the Michigan Civil Rights Act to the employment practices of air carriers in this state, as ruled in *Fitzpatrick*, then a fortiori the same preemptive effect of the FAAAA must apply to any economic regulation imposed on motor carriers by the MCA.[4] Thus, the question is whether the Michigan

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without, however, explaining what was meant by those terms of qualification or how they should be applied to "a border-line question." Rather, *Morales* said only that "we express no views about where it would be appropriate to draw the line." *Id*, quoting *Shaw v Delta Airlines, Inc.*, 463 US 85, 100 n 21; 103 S Ct 2890; 77 L Ed 2d 490 (1983).

[3] That ruling was recently limited by *Gilman v Northwest Airlines, Inc.*, 230 Mich App 293, 303-304; ___ NW2d ___ (1998), which held that the same federal statute does not preempt the Michigan Civil Rights Act prohibitions of age and sex discrimination because those employee characteristics have no apparent connection or relation to an airline's routes, prices or services. *Gilman*, at 298-300, distinguished *Fitzpatrick*, supra, which had dealt only with height and weight discrimination in employment.

[4] The PSC acknowledges such preemptive effect on specific provisions of the MCA and has ceased to enforce those sections it considers preempted. Thus, the PSC no longer requires applicants

requirements challenged here, viz., the fees authorized by art IV, §§ 1 & 2 of the MCA, are manifestations of economic regulation. If so, they are preempted. If not, they may still be preempted if related, no matter how indirectly, to the price, route or service of a motor carrier. See *Morales*, supra, p 386. However, where such indirect relationship is "too tenuous, remote, or peripheral" to implicate preemption, the state legislation may be permitted to stand unaffected by the national policy of economic deregulation. *Id*, p 390.

While the tenuousness or peripherality of an "indirect relationship" has not been expressly addressed, there are some indications that it need not be particularly remote from the preempted field. For instance, in *American Airlines v Wolens*, supra, 130 L Ed 2d at 726 n 5, the United States Supreme Court endorsed the view that "the ban on enacting or enforcing any [state] law 'relating to rates, routes, or services' is most sensibly read, in light of the [federal law's] overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation in the operation of an air carrier.'" That view was prefigured in *Morales*, supra, p 378, which recognized that the federal law was designed to place "maximum reliance on competitive market forces" under a uniform national regime of economic deregulation, i.e., "[t]o ensure that the States would not undo federal deregulation with regulation of their own." Thus, that federal enactment, as *American Airlines* stated at 728, "stops States from

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for certificates of authority to present evidence that their proposed service will serve a required public purpose without creating excess service. It no longer mandates that carriers avoid predatory pricing practices or file tariff schedules. Similarly, it no longer exercises its authority under the MCA to determine reasonable and sufficient rates, fares, charges and classifications or to penalize unlawful discrimination. See *In re Federal Preemption*, supra, p 297.

imposing their own substantive standards with respect to rates, routes, or services." That would suggest that the fees challenged here are not preempted by § 601 since they impose on motor carriers no particular "substantive standards" of competition or regulation.

The Commission's determinations regarding the effect of § 601 on the MCA were summarized recently in *In re Federal Preemption*, supra, p 295:

> "the PSC concluded that § 601 preempts only regulatory provisions concerning price, routes, and service – the essence of economic regulation. The PSC found it had substantial residual regulatory authority, including regulatory authority over matters such as safety. The PSC further concluded that it should continue a certification process (albeit, a 'streamlined' certification process) for intrastate motor carriers and that it could and should continue to assess statutorily mandated fees. . . . Since issuing its decisions, the PSC has ceased enforcing those provisions of the Motor Carrier Act that it concluded had been preempted."

Thus federal preemption under § 601 and the Commission's decisions applying that federal principle to the MCA have substantially altered the regulatory framework for the trucking industry in Michigan. *Id*, p 298.

Even so, the court in *In re Federal Preemption*, p 301, ruled that much of the MCA survives the federal preemption statute:

> "[I]t is clear and unambiguous from the language of § 601 that the congressional intent was not to preempt all state regulation of the trucking industry. Section 601 expressly excepts from its preemptive effect significant aspects of regulation, including safety regulation, regulation of size and weight of vehicles, regulation of insurance requirements, and regulation of the transportation of household goods. If the language of a

> statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent. . . . . Furthermore, the House Conference Report indicates that "economic regulation' is intended to be preempted and that states retain their authority to regulate various aspects of the transportation industry. See H R Conf Rep No 677, 103d Cong, 2d Sess, pp 84-85. . . . . The argument that Congress intended to preempt the entire filed of regulation of motor carriers fails in the face of the language of the legislation and its history. The PSC's determination that § 601 was intended to preempt only economic regulation is consistent with the language and history of the legislation."

See also *Michigan Trucking Ass'n v Public Service Comm (on Remand)*, 225 Mich App 424, 427-429; 571 NW2d 734 (1997).

Significantly, the *Federal Preemption* court, pp 302-303, also rejected the contention reiterated by Plaintiffs here that federal preemption of all economic regulation means that the fees assessed under the MCA to finance that regulation must likewise be preempted, especially since the primary focus of the MCA had traditionally been economic regulation of the trucking industry:

> "Section 601 did not preempt the entire Motor Carrier Act. Section 601 of the FAAAA does not in its words indicate an intent to preempt fee provisions such as those challenged by these appellants. The legislative history reflects a contrary intent. The House Conference Report states that nothing in the legislation is intended to change the application of state tax laws to motor carriers. H.R. Conf. Rep. No. 677, supra, p 85.
>
> "The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It

> follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for certificate, MCL 478.1a; MSA 22.560(1), and for administering the act, MCL 478.2(1) MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact, because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants . . . have not shown that the cost of the PSC's operations has ever been totally funded by the fees its [sic] collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation."

The Court of Appeals has spoken. In two published decisions, *Federal Preemption* and *Michigan Trucking Ass'n*, supra, it has ruled that § 601 did not preempt the MCA in its entirety, and least of all in matters of safety regulation and the application and vehicle fees challenged here. That must be this Court's judgment as well. In short, Plaintiffs' motion based on the federal preemption claim must be denied.

SINGLE STATE REGISTRATION SYSTEM

Congress has provided for a Single State Registration System (SSRS) that requires a motor carrier having interstate authority to register annually with only one of the states among those it is authorized to provide transportation service. Under 49 U.S.C. 11506, the SSRS is deemed to satisfy the registration requirements of all other states, except for a nominal fee "not to exceed $10 per vehicle" that is permitted annually to each participating state. The same section prohibits as an unreasonable burden on interstate commerce any other fee not in accordance with that specifically authorized.

Plaintiffs complain that the MCA violates the SSRS by its art IV, § 2(2) requirement of a $100.00 annual fee per

vehicle that is registered in Michigan and operated entirely in interstate commerce by a Michigan-licensed motor carrier. Alternatively, they contend that § 2(2) is effectively preempted by the SSRS mandate that no participating state, other than the registering state, exact more than an annual fee of $10.00 per vehicle operated in interstate commerce. In either case, this MCA vehicle fee is supposedly rendered a nullity by the SSRS.

Of course, Michigan's MCA "applies to entities engaged in interstate commerce only to the extent it is consistent with federal law. MCL 476.12; MSA 22.545." *Federal Preemption,* supra, p 294. Here, however, there is no inconsistency. Section 2(2) of article IV of the MCA applies only to vehicles registered in Michigan by Michigan-licensed motor carriers, i.e., where Michigan is the "registering state." The SSRS fee system places a $10.00 annual vehicle fee limit on only the "participating states." however, not on the 'registering state." The SSRS neither prohibits no preempts the Act's § 2(2) vehicle fee.

Moreover, the MCA expressly accommodates the fee system mandated by the SSRS. In article IV, section 7, MCL 478.7; MSA 22.566, the Act provides for the registration of and fees paid by carriers engaged in interstate transportation pursuant to the SSRS and any other reciprocal multistate agreement. In particular, subsection (4) mandates that "[t]he annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00." Obviously, that is perfectly consistent with the annual $10.00 vehicle fee permitted each participating state by the SSRS. Plaintiffs' motion must therefore be denied.

COMMERCE CLAUSE

The dormant Commerce Clause of US Const, art I, § 8, prohibits a state from erecting barriers to the national regime of free trade by enacting tax or fee requirements that

constitute an undue burden on or discrimination against interstate commerce. Plaintiffs assert that the MCA art IV, § 2(1) vehicle fee for intrastate Michigan transportation impermissibly discriminates against interstate motor carriers by favoring domestic carriers whose business is exclusively intrastate. This is supposed to be so essentially because domestic intrastate carriers necessarily derive a disproportionately greater financial advantage for their § 2(1) fees than do those interstate carriers that may want to make an occasional intrastate haul while their vehicles are visiting Michigan. The Court is not persuaded that the choice of whether to engage primarily in interstate rather than exclusively in interstate transportation, made by private businesses competing in the free marketplace, affects Commerce Clause concerns. And it surely cannot result in the invalidation of § 2(1) on Commerce Clause grounds.

Plaintiffs cite *American Trucking Ass'ns v Scheiner,* 483 US 266, 282; 107 S Ct. 2829; 97 L Ed 2d 226 (1987), for its condemnation of "flat taxes" whose unapportioned measure results in discrimination against some participants in interstate commerce in a manner that contradicts the purpose of the Commerce Clause. As *Goldberg v Sweet,* 488 US 252, 266; 109 S Ct 582; 102 L Ed 2d 607 (1989), explained, "in *Scheiner*, we held that Pennsylvania's flat taxes on the operation of all trucks on Pennsylvania highways imposed a disproportionate burden on interstate trucks, as compared with intrastate trucks, because the interstate trucks traveled fewer miles per year on Pennsylvania highways." Here, the MCA intrastate vehicle fee is alleged to be just such a "flat tax" and therefore impermissible under the principles enunciated in *Scheiner*. Plaintiffs' reliance on *Scheiner* is misplaced.

First, the taxes at issue in that case were exacted for the purpose of financing roadway upkeep based on highway usage, but the flat tax on the privilege of operating on the state roads failed to take into account varying degrees of such

usage by the different carriers. Here, however, the fee exacted is regulatory and intended "for administering the act." *Federal Preemption,* supra, p 302. Such state regulation as remains after federal preemption, including regulation of vehicular size and weight, insurance requirements and safety standards, is not amenable to a fee structure based on apportionment by usage rates. And the fee itself is plainly not a tax on the privilege of doing business in Michigan.[5] Thus, Commerce Clause interests are not affected by the intrastate vehicle fee.

Second, the flat taxes in *Scheiner* applied across the board to any vehicle traveling the state's highways, whereas the fee here is exacted only of those vehicles, foreign or domestic, that the carrier chooses to operate in point-to-point intrastate Michigan service. The interest furthered by that fee, viz., ensuring that vehicles and carriers operating on Michigan highways in intrastate service comply with MCA safety and fitness norms, is an exercise of state police power and the legitimate expression of the state's concern that the welfare of its citizens be protected. That interest plainly does not have a prejudicial effect on interstate commerce and thus does not impact the Commerce Clause.

Third, *Scheiner* itself provides ample reason to think its principles are inapplicable to the intrastate vehicle fee of the MCA. There the Court found dispositive its precedents holding "that the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own

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[5] It might also be pointed out that there is a distinction between a tax and a fee, although the *Scheiner* Court did not adhere to it. Neither did the Court of Appeals in *Federal Pre-emption,* supra at 302, quoted above in context, which spoke of the MCA fees as if they were nothing different from "the application of state *tax laws* to motor carriers." (Emphasis added.)

residents who also engage in commerce among States." *Id,* p 282 (footnote deleted). Stated more plainly, this principle applies only where foreign and domestic carriers are all competing in interstate commerce. Thus, Michigan cannot, consistent with the Commerce Clause, tax foreign carriers more heavily than domestic carriers engaged in interstate competition. It can, however, impose the identical vehicle fee of $100.00, as authorized by § 2(1), on all carriers that opt to provide intrastate Michigan transportation services. That fee does not implicate Commerce Clause concerns.

In short, the fee burden here does not fall more heavily on foreign carriers than on Michigan carriers engaged in interstate commerce. It is, rather, the same for all carriers that choose to provide intrastate Michigan haulage services either exclusively or in addition to interstate operations. As was said in *Scheiner*, p 283, "the Commerce Clause is not offended when state boundaries are economically irrelevant." That is surely true of the § 2(1) intrastate vehicle fee based on Michigan boundaries, which have no economic relevance for interstate traffic. The motion challenging that fee on Commerce Clause grounds must therefore be denied.

The Court determines that Plaintiffs' motions for partial summary disposition are meritless. All three motions must therefore be denied. An order consistent with this opinion may enter upon its proper presentation.

[s]
JAMES R. GIDDINGS
Circuit Judge

DATED: Oct. 13, 1998

APPENDIX C

STATE OF MICHIGAN
IN THE COURT OF CLAIMS
DOCKET NO. 95-15628-CM
WESTLAKE TRANSPORTATION, INC., et al.,
Plaintiffs,
and
AMERICAN TRUCKING ASSOCIATIONS, INC.
and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs,
-vs-
MICHIGAN PUBLIC SERVICE COMMISSION, et al.
Defendants.

DOCKET NO. 95-15631-CM
TROY CAB, INC., et al.,
Plaintiffs,
and
AMERICAN TRUCKING ASSOCIATIONS, INC.
and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs,
-vs-
STATE OF MICHIGAN, et al.,
Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

At a session of said Court held in the
City of Lansing on the 7th day of
March, 2000.

PRESENT: HONORABLE JAMES R. GIDDINGS
Circuit Judge

The Court having entered on December 30, 1998 an order granting Defendants' renewed Motion for Summary Disposition and dismissing these consolidated complaints challenging the constitutionality of certain fees imposed on the trucking industry by Michigan law as administered by the Public Service Commission; Plaintiffs having filed a Motion for Reconsideration and brief in support; the Court having reviewed the motion and brief, and being fully advised in the premises.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs' Motion for Reconsideration is DENIED, because it does not appear that the order of dismissal was erroneously entered. The motion does little more than rehash issues presented and decided earlier. "[A] motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonably implication, will not be granted." MCR 2.119(F)(3). Plaintiffs fail to demonstrate palpable error by which the Court has been misled. *Id.* Thus, there is not need to address each of Plaintiffs' renewed issues. The Court will comment, however, on the salient problems presented in the motion, principally those challenging the constitutionality of certain fees, identified and cited in the Court's written opinion of October 13, 1998, imposed on for-hire motor carriers by the Motor Carrier Act (MCA).

There is a presumption favoring the constitutionality of statues. *McDougall v. Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999); *H.J. Tucker & Associates, Inc. v. Allied Chucker & Engineering Co.* 234 Mich App.550, 556; 595 NW2d 176 (1999). In den 461 Mich. 944 (2000). Not only are statutes presumed constitutional but Michigan courts also have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *Mahaffey v. Attorney General*, 222 Mich. App. 325, 344; 564 NW2d 104 (1997). A successful challenge to the facial constitutionality or a statute must establish that there exit no circumstances under

which the statute would be valid. *Council of Organizations & Others for Education About Parachiaid v. Governor*, 455 Mich. 557, 568 & 602; 566 NW2d 208 (1997), quoting *United States v. Salerno*, 481 U.S. 739, 745; 107 S. Ct. 2095; 95 L. Ed. 2d. 697 (1987). Indeed, an interpretation of the Constitution that does not result in a statute being found invalid is preferred to one that does. *House Speaker v. Governor*, 443 Mich. 560, 585; 506 NW2d 190 (1993), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175; 2 L. Ed. 60 (1803). Plaintiffs fail to overcome the presumption.

Accordingly, it is the Court's duty to determine whether the MCA is capable of any construction that would make it constitutional. *Michigan United Conservation Club v. Dep't of Treasury*, ___ Mich App ___; NW2d ___ (opinion by Judge Markey, docket 208429, issued December 10, 1999), slip opinion, p. 4. Are the fees imposed on for-hire carriers by the MCA at odds with the plain language of the Constitution? The Court has already determined, by the order of December 30, 1998, that they are not. The same conclusion must prevail here.

Plaintiffs assert first that these fees are invalid and the Court must order that they be at least partially refunded because they are actually, taxes that have not been properly adopted in accordance with the constitutional requirements. They contend that the fees are disproportionate to the necessary costs of regulating for-hire motor carriers, and that the moneys collected from the fees are largely used as general revenue to finance other aspects of government activity. They also point to *Yellow Freight System, Inc. v. Michigan*, 231 Mich. App. 194, 208; 585 NW2d 762 (1998), where the Court of Appeals opined that revenue collection "in the form of a fee" imposed by the MCA should be treated like "state tax cases" for purposes of 42 U.S.C. 1983 and the rule enunciated in *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm*, 515 US 582; 115 S. Ct 2351; 132 L.

Ed.2d 509 (1995). This Court, they suggest, should therefore treat these fees as if they were taxes. The Court disagrees.

There is no bright-line test for distinguishing a tax from a fee. *Bolt v. City of Lansing*, 459 Mich. 152, 160; 587 NW.2d 264 (1998); *Graham v. Kockville Twp*, 236 Mich. App. 141, 150; 599 NW2d 793 (1999). Whether the charges exacted for these applications and renewals of authority and for truck decals are properly characterized as fees or taxes requires consideration of several factors. *Bolt* at 161. No single factor is determinative of the distinction; rather, all factors should be considered in determining whether together they preponderate in one direction or the other. *Id.* at 163-169. Accord *Graham* at 151, citing *Bolt* at 167, n 16: "[T]hese criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee."

Generally, a fee is paid for a service rendered or a benefit conferred where there is "some reasonable relationship" between the amount of the fee and the value of the service or benefit, whereas a tax is meant simply to raise revenue. *Bolt* at 161, quoting *Saginaw Co. v. John Sexton Corp. of Michigan*, 232 Mich. App. 202, 210; 591 NW2d 52 (1998). Exactions imposed primarily for public rather than private purposes are taxes; the revenue raised by taxes inures to the benefit of all, as opposed to fees paid by a few for benefits that inure to the persons or group assessed. *Id.*, citing *Bray v. Dep't of State*, 418 Mich. 149, 162; 341 NW2d 92 (1983), which quoted *Dukesherer Farms, Inc. v. Dep't of Agriculture (After Remand)*, 405 Mich. 1, 15-16; 273 NW2d 877 (1979).[1]

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[1] This "factor" can be confusing if it is mistakenly thought to require that the moneys acquired from fees never be used to benefit the public. On the contrary, regulatory fees such as those at issue here are an exercise of the police power of the community whose

Three criteria apply to the distinction between a fee and a tax. The first criterion requires that a fee serve a regulatory rather than a revenue-raising purpose. *Bolt*, *supra*, citing *Merrelli v. St. Clair Shores* 355 Mich. 575, 583-584; 96 NW2d 144 (1959), which quoted *Vernor v. Secretary of State*, 179 Mich. 157, 167-170; 146 NW 338 (1914).[2] The second criterion requires that a fee be proportionate to the necessary cost of the benefit or service provided. *Id.* at 162, citing *Merrelli*, *supra*, and *Bray*, *supra* at 160, and quoting *Vernor*, supra at 167. The third criterion requires that a fee be characterized by some degree of "voluntariness" in that those who pay it be able to refuse or limit their use of the benefit or service. Id. at 162-163, citing *Ripperger v. Grant Rapids*, 338 Mich. 682, 686; 62 NW2d 585 (1954), which quoted *Jones v. Detroit Water Comm'rs*, 34 Mich. 273, 275 (1876).[3]

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purpose is the protection of the public health, safety and welfare. Indeed, "such moneys are incidental to the accomplishment of the primary purpose of guarding the pubic." *Merrelli v. St. Clair Shores*, 355 Mich. 575, 583; 96 NW2d 144 (1959).

[2] Citing the same precedent, *Graham*, *supra*, recently qualified the first criterion by saying that a fee can have a secondary revenue-raising purpose without having to treat the fee as a tax: "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." The principle applies here.

[3] But see *Bolt v. City of Lansing* (*On Remand)*, 238 Mich. App. 37, 45-48; ___ NW2d ___ (1999), where it appears that confusion over the historic import of these factors persists. This Court agrees with Judge Markman's dissent, pp. 67-71, pointing out that the Supreme Court in *Bolt*, supra, relied on long-established precedent in distinguishing fees from taxes and did not create some "new" test of the difference between them. This Court also agrees with the dissent, at 71, when it says "in virtually all such disputes, the application of a 'totality of factors' tests will inevitably entail some

The challenged fees are not unlawful taxes. As was summarized in *Bolt*, *supra* at 162, quoting *Vernor*, *supra* at 167:

> "'To be sustained [as a regulatory fee], the act we are here considering must be one for regulation only, and not as a means of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license, and the regulation of the business to which it applies.'" (Brackets in original.)

In *Merrelli*, *supra* at 583-584, quoting *Vernor*, *supra* at 168, the proportionality of a fee was linked to its presumed reasonability:

> "' [W]hat is a reasonable fee must depend largely upon the sound discretion of the legislature, having reference to all the circumstances and necessities of the case. It will be presumed that the amount of the fee is reasonable, unless the contrary appears upon the face of the law itself, or is established by proper evidence. . . .
>
> "' In determining whether a fee required for a license is excessive or not, the absence or amount of regulatory provisions and the nature of the subject of regulation should be considered, and, if the amount is wholly out of

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uncertainty in terms of the ultimate result, while also affording both sides some measure of reasonable argument." That, however, puts the Markman dissent in close proximity to that in *Bolt* at 176, where Justice Boyle expressed strong doubt, shared by this Court, that the "test" is straightforward and consistent enough to be applied with any degree of precision to this "legal conundrum." But perhaps that should go without saying where the test is admittedly not one of "bright lines" — which is, incidentally, one reason for the *Bolt* decision having split 4:3.

proportion to the expense involved, it will be declared a tax. * * *"" (Cites deleted.)

As *Vernor* also said at 168, in important language not quoted in *Merrelli*, "If revenue is incidentally derived which is not so disproportionate as to make the fee charged unreasonable, there can be no objection." Accord *Graham*, *supra* (see footnote 2). That is the case here.

The Court determines that the MCA fees are not "wholly out of proportion to the expense involved" in the Commission's regulation of the motor carrier industry. The revenue incidentally derived therefrom, even if in excess of the necessary costs of regulation, is not so disproportionate as to render these fees unreasonable — especially since they are supportive of the underlying regulatory purpose. *Graham*, *supra*. Payment of the fees is not compulsory inasmuch as carriers choose just how much of a presence in Michigan, if any, they want their trucks to have. Consistent with the criteria set out in *Bolt*, supra at 161-162, these fees serve a regulatory purpose, are proportionate to the necessary costs of the regulatory service and are voluntary. Compare *Graham*, *supra* at 152-156. The Court must therefore defer to the sound discretion of the legislature in deciding what MCA fees would be reasonable. In short, these fees are not taxes and Plaintiffs are therefore not entitled to a refund.

Second, Plaintiffs assert that the challenged fees are facially infirm for their disparate treatment of for-hire motor carriers relative to all other motor carriers that regularly travel Michigan highways. On this view, since the latter group is not subject to the imposition of MCA fees there can be no rational basis for such dissimilar treatment of motor carriers. Saying that "[t]he classification made by the [MCA] is arbitrary and discriminates against for-hire motor carriers," Plaintiffs complain that the MCS denies them equal protection of the law by requiring that only they, and not private or exempt carriers, pay for police enforcement of

safety provisions applicable to the entire trucking industry. Indeed, "There is no difference between for-hire motor carriers, on the one hand, and private and exempt carriers, on the other hand, in terms of the safety concerns that they pose to the traveling public . . . [or] of the amount of police enforcement required to see that they are complying with the law . . . [or] of the amount of damage caused by such carriers to the state and federal highways." Pointing out that the for-hire carriers "have exactly the same interest as private carriers in operating their equipment in a safe fashion," Plaintiffs conclude that imposition of these fees on only the former must be "irrational," "arbitrary" and "discriminatory," and therefore must offend equal protection of the law principles.

This view fails to see, however, that the process of drawing lines and distinguishing between kinds of motor carriers for regulatory purposes is a legislative task of identifying priorities, weighing relevant considerations and choosing among competing alternatives. Equal protection guarantees do not require that such distinctions be ideal: "'[T]he drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making necessary classifications is neither possible nor necessary.'" *O'Donnell v. Farm Mutual Automobile Ins. Co.*, 404 Mich. 524, 542; 273 NW2d 829 (1979), app dis 444 U.S. 803 (1980), quoting *Massachusetts Bd. of Retirement v. Mugia*, 427 U.S. 307, 314; 96 S. Ct. 2562; 49 L. Ed.2d 520 (1976), and *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 489; 97 S. Ct. 1898; 52 L. Ed.2d 513 (1977).

Nor does equal protection require the legislature to deal with every aspect of the problems presented in motor-carrier regulation at the same time. A statute is not unconstitutional merely because it might have gone further than it did by solving all such problems at once. The legislature need not simultaneously "strike at all evils" associated with such regulatory problems; rather, the measure adopted "'may take

one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'". *Id.* at 543, quoting *Katzenbach v. Morgan*, 384 U.S. 641, 657; 85 S. Ct. 1717; 16 L. Ed.2d 828 (1966), and *New Orleans v. Dukes*, 427 U.S. 297, 305; 96 S. Ct. 2513; 49 L. Ed.2d 511 (1976). All that need be shown is that there was a rational basis for the particular lines that were drawn. If so, the legislative judgment must then be sustained. *Id.* "The mere fact that the Legislature has chosen to draw a distinction" between for-hire and private motor carriers for purposes of this kind of regulation "does jot mean that [the MCA] is unconstitutional." Id. at 547. See also In re Forfeiture of $109,901, 210 Mich. App. 191, 197; 533 NW2d 328 (1995).

Plaintiffs are not members of a protected class and fundamental rights are not implicated in these consolidate actions. This equal protection claim must therefore be assessed by means of a rational basis test. *Saginaw Co., supra* at 222-223. citing *Yaldo v. North Pointe Ins Co.* 457 Mich. 341, 349; 578 NW2d 274 (1998). Michigan courts must uphold the challenged statute where it furthers a legitimate governmental interest and the classification is rationally related to achieving that interest. *Id.* at 223. This requires only that the legislation's distinctions bear a reasonable relationship to a permissible legislative objective. *Pioneer State Mutual Ins. Co. v. Allstate Ins. Co.* 417 Mich. 590, 599-600; 339 NW2d 470 (1983). There need only be some reason for thinking that the means chosen, i.e., the statute's distinctions, are likely to further the legislature's goals. *Doe v. Dep't of Social Services*, 439 Mich. 650, 662; 487 NW2d 116 (1992), citing *Shavers v. Attorney General*, 402 Mich. 554, 613; 267 NW2d 72 (1978), cert den 442 U.S. 934 (1978).

The application and renewal fee and the intrastate and interstate decal fees required by the MCA reflect the legislature's intent to regulate the non-preempted aspects of

the for-hire motor carrier industry remaining after federal preemption of the economic aspects. It surely was not unreasonable for legislators to think that industry in a materially different position relative to the public interest than private carriers. That distinction rationally comports with the legislative intent to subject the former to regulation for the sake of guarding the public. Whether that means to securing the public interest actually works out as intended is another question that is of no concern to equal protection analysis. *O'Donnell, supra* at 549.

Further, the legislature's statutory distinction between commercial and private motor carriers for the purpose of exacting these fees is a valid classification designed to address the specific concerns of this legislation. The objective is without doubt a legitimate state interest, and there is nothing unreasonable or irrational about the classification scheme's relationship to that goal. The fees are not arbitrary since they represent a reasonable effort by government to assure that the public is adequately protected against potential dangers posed by for-hire carriers. Although the lines drawn by the legislature in making the MCA applicable only to commercial carriers may be imperfect, that is not sufficient to render them unconstitutional. "'That the legislative solution appears undesirable, unfair, unjust or inhumane does not of itself empower a court to override the legislature and substitute its own solution.'". *Doe, supra* at 681, quoting *Manistee Bank & Trust Co. v. McGowan*, 394 Mich. 655, 666-667; 232 NW2d 636 (1975). In short, the challenged fees do not violate equal protection of the law.[4]

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[4] Given the Court's disposition of the first two issues, there is no need to treat Plaintiffs' third issue based on 42 U.S.C. 1983. That is so because § 1983 is merely a vehicle for the vindication of viable claims, and here no such claims remains.

The Court will address next one facet of the federal preemption issue[5] that inadvertently went untreated in the written opinion of October 13, 1998. There, at 11, this Court ruled that the Single State Registration System (SSRS), 49 U.S.C. 11506, now 49 U.S.C. 14504, neither preempted nor prohibited the § 2(2)per vehicle interstate decal fee of $100 imposed by the MCA. The Court reaffirms that ruling and now considers Plaintiffs' contention that, even if that is correct (which they dispute), the same fee had been preempted or prohibited long before Congress adopted the SSRS in 1991 and the Interstate Commerce Commission (ICC) implemented it in 1994. Specifically, they argue that certain pre-SSRS regulations of the IC had imposed an absolute limit, "not to exceed" $5 at one time and $10 later, on all interstate decal fees, including those required by the state that registers and licenses a motor carriers' vehicles. This Court disagrees.

Neither before implementation of the SSRS nor after did the Congress or the ICC impose a ceiling on the fee that a registration state may charge for per-vehicle interstate decals. The fee limits that were imposed applied only to states where the vehicles were not based and registered. The case vaunted by Plaintiffs as providing "an excellent educational discussion of federal law both prior to and after implementation of the SSRS." *Nat' Ass'n of Regulatory Utility Comm'rs* v. *Interstate Commerce Comm.*, 309 U.S. App. D.C. 325; 41 F.3d 721, 724 (1994), says nothing different.[6] Indeed, it does not even touch on the issue but

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[5] For a summary of preemption principles, see *Walker v. Johnson & Johnson Vision Products, Inc.*, 217 Mich. App. 705, 710-713; 552 NW2d 679 (1996).

[6] As to the SSRS, the same case points out at 725 that Congress distinguished the registration state from the participating states:

> The "registration state" may require applicants to submit evidence that they have been certified by the ICC, that they are properly insured, and that they have a local agent available for service of process .... The registration state also collects and distributes per-vehicle fees for those other states participating in the "single-state" system through which the carrier seeks to run its vehicles .... Participation is limited under the statute to the 39 states that had earlier elected to join the "bingo stamp" program .... Each of these states may charge carriers an amount 'equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991,' .... and the registration state must 'issue a receipt ... reflecting that the carrier has filed proof of insurance ... and has paid fee amounts in accordance with the fee system established' .... (Cites deleted.)

The *Nat'l Ass'n* court scrupulously followed this distinction throughout its opinion. This Court has done the same here.

does stress that it was the congressional intent in establishing the SSRS not only "'to benefit the interstate carriers by eliminating unnecessary compliance burdens,'" but also "'to preserve revenues for the states [like Michigan] which had participated in the bingo [card/stamp] program'" of interstate reciprocity under regulation by the ICC. *Id.*, quoting H.R. Conf. Rep. No. 102-404, 102d Cong. 1st Sess. 437 (1991).

In particular, the ICC regulation at issue, 49 C.F.R. 1023.33, remained substantially unchanged from 1982 through 1992 when the agency began its rulemaking implementation of the SSRS. Throughout that period, it is clear that the regulation and its fee limitation applied only to those states requiring "identification stamps" or an identification number for each vehicle not registered or licensed by such states. It did not apply to the state of registration. The § 2(2) per-vehicle interstate decal fee of the MCA is imposed only where Michigan is the state of registration and licensing. It was therefore not preempted or

proscribed by federal law either before or after implementation of the SSRS. In short, Plaintiffs are not due any refund.

Finally, Plaintiffs assert that the Court must grant reconsideration in light of *Yellow Freight*, *supra*, which they say "is dispositive as to certain critical issues in the instant case." It appears, however, that the only issues presented here that *Yellow Freight* disposed of dealt with remedies, whereas Plaintiffs have no remedy in this matter because they cannot prevail on the merits. *Yellow Freight* held that the state had collected SSRS fees pursuant to § 7(4) of the MCA in excess of the amount allowed by the SSRS and that the excess amount had to be refunded. But none of the Plaintiffs in this action, including those named in the Troy Cab complaint, challenges fee collections under § 7(4) on that specific ground. They allege, rather, that such $10 fee assessed against carriers registered and licensed not by Michigan but by the other participating states is somehow "inconsistent" with the SSRS requirements – but without spelling out the precise inconsistency implicated in *Yellow Freight*.[7] It follows that *Yellow Freight* does not govern

---

[7] The inconsistency identified in *Yellow Freight*, p. 198, has not been put in contention here:

> "For the 1991 and 1992 registration years, the state collected fees by requiring interstate carriers to buy cab card stamps, also known as 'bingo stamps,' for each of the carrier's vehicles operating within the state. Each stamp cost $10. Pursuant to MCL 478.7(4), MSA 22.565(1)(4), the state had reciprocity agreements with certain other states to that each would waive the fees for vehicles from the other. The dispute a rises in part because *the state changed the method it used for determining reciprocity*. For 1991, the state used the 'base-plating system,' which means that reciprocity was determined by the state of the vehicle's registration. In early 1991, the Public Service Commission (PSC) decided that it would quit suing the base-plating system. Instead, for the 1992 registration year, fees and reciprocity were determined by the carrier's principal place of business." (Emphasis added.)

As a result of this change of method, the plaintiff paid Michigan about $37,800 more under the new system than it had under the old, a "substantial increase in fees" that clearly violated the SSRS. Id. at 198-199.

here. Plaintiffs do not challenge § 7(4) based on any inconsistency with the SSRS stemming from the changed method, implemented by the PSC in 1992, for determining reciprocity among the states.

The Court determines that its order of December 30, 1998 was not erroneously entered. The challenged MCA fees are not unlawful taxes and do not violate equal protection guarantees. Plaintiffs therefore have no remedy, either in the form of refunds or as equitable relief pursuant to § 1983 because, as previously ruled, they cannot prevail on the merits. The Plaintiffs' Motion for Reconsideration must therefore be denied.

IT IS FURTHER ORDERED AND ADJUDGED that the Court's written opinion of October 13, 1998, which is incorporated hereby by reference, is CONFIRMED. The challenged MCA fees were not preempted by federal legislation and regulations. In particular, the § 2(2) per-vehicle interstate decal fee of $100 was not preempted or prohibited by federal law either before or after implementation of the SSRS where the vehicle's "registration state" is Michigan and where the vehicle is operated entirely in interstate commerce by a Michigan-licensed commercial motor carrier. By the same token, the § 2(1) per-vehicle intrastate decal fee of $100 did not violate the dormant Commerce Clause since it could not impermissibly discriminate against interstate motor carriers where the fee is based purely on Michigan boundaries having no economic

relevance for interstate traffic. The challenged fees are constitutional and need not be refunded.

IT IS FURTHER ORDERED AND ADJUDGED that this is the final order of the Court and these consolidated cases are hereby DISMISSED.

IT IS SO ORDERED.

[s]
JAMES R. GIDDINGS
Circuit Judge

APPENDIX D

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., EL TORO MOTOR FREIGHT, INC., MYRIAH, INC., PRISM, INC., GERRIGS TRUCKING & LEASING INC., and BEST WAY EXPRESS, INC.,
Plaintiffs-Appellees,

and

AMERICAN TRUCKING ASSOCIATION, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs-Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, and the STATE OF MICHIGAN,
Defendants-Appellees.

SC: 123566-7
COA: 226052, 226122
Court of Claims: 95-015628-CM

Entered: December 3, 2003

ORDER

On order of the Court, the application for leave to appeal the March 11, 2003 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 3, 2003 */s/ Corbin R. Davis*

APPENDIX E

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., EL TORO MOTOR FREIGHT, INC., MYRIAH, INC., PRISM, INC., GERRIGS TRUCKING & LEASING INC., and BEST WAY EXPRESS, INC.,
Plaintiffs-Appellees,

and

AMERICAN TRUCKING ASSOCIATION, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs-Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, and the STATE OF MICHIGAN,
Defendants-Appellees.

SC: 1023562-3
COA: 226052, 226122
Court of Claims: 95-015628-CM

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, TIBERIO FRANK, d/b/a FAIRFIELD TOWING, ELEX, INC., d/b/a LAFOND EXPRESS, DALE CONSTINE & SONS, INC., CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY, AMBASSADOR TRANSPORTATION, INC., HAWKINS STEEL CARTAGE, INC., MIDCON FREIGHT SYSTEMS, INC., JLH TRANSFER, INC., H & H ENTERPRISES, d/b/a S&M CARTAGE, INC., CENTRAL TRANSPORT, INC., BANCROFT TRUCKING COMPANY, US

TRUCK COMPANY, INC., WEST END CARTAGE, INC., CENTRAL CARTAGE COMPANY, CTX, INC., MOHAWK MOTOR MICHIGAN, INC., ECONOMY TRANSPORT, INC., MCKINLAY TRANSPORT LIMITED, MASON & DIXON LINES, INC., UNIVERSAL AMCAN LIMITED, ROMEO EXPEDITERS, INC., TOM THUMB SERVICES, INC., d/b/a REI, OJ TRANSPORT COMPANY, JLAW ENTERPRISES, INC., and OJ TRANSPORT, INC.,
Plaintiffs-Appellants,

and

AMERICAN TRUCKING ASSOCIATION, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs-Appellees,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, DEPARTMENT OF COMMERCE, and the STATE OF MICHIGAN,
Defendants-Appellees.

SC: 123564-5
COA: 226053, 226137
Court of Claims: 95-015631-CM

Entered: December 3, 2003

ORDER

On order of the Court, the application for leave to appeal the March 11, 2003 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 3, 2003 */s/ Corbin R. Davis*

(4)

No. 03-1230

Supreme Court, U.S.
FILED
APR 30 2004
OFFICE OF THE CLERK

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., and USF HOLLAND, INC.

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL,

Respondents.

On Petition For Writ of Certiorari To The Michigan Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Michigan Motor Carrier Act motor carriers must pay an annual fee of $100 per vehicle to operate intrastate. Petitioners assert requiring the $100 fee for a vehicle that conducts both intrastate and interstate transportation violates the Commerce Clause. Petitioners failed to present evidence to the trial court that any trucking firm's route choices were affected by the imposition of the fee and only offered hypotheticals in support of their case. Based on the record before it, the Michigan Court of Appeals found that any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination. Further, the Michigan Court of Appeals found the $100 fee is not clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways.

The questions presented are:

Where Petitioners failed to present evidence to support their claims, did the Michigan courts properly grant summary disposition against them?

Did the Michigan Court of Appeals correctly conclude, based on the record before it, that the $100 fee was not discriminatory, was not clearly excessive, and did not violate the Commerce Clause?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Michigan Court of Appeals were Westlake Transportation, Inc., Vanverkooi Carriers, Inc., El Toro Motor Freight, Inc., Myriah, Inc., Prism, Inc., Gerrigs Trucking & Leasing, Inc., Best Way Express, Inc., Troy Cab, Inc., Deeco Services, Inc., d/b/a Deeco Transportation, Tiberio Frank, d/b/a Fairfield Towing, Elex, Inc., d/b/a Lafond Express, Dale Constine & Sons, Inc., Calcut Sales & Services, Inc., d/b/a Calcut Trucking Company, Ambassador Transportation, Inc., Hawkins Steel Cartage, Inc., Midcon Freight Systems, Inc., JLH Transfer, Inc., H & H Enterprises, Inc., d/b/a S & M Cartage, Inc., Central Transport, Inc., Bancroft Trucking Company, US Truck Company, Inc., West End Cartage, Inc., Central Cartage Company, CTX, Inc., Mohawk Motor Michigan, Inc., Economy Transport, Inc., McKinlay Transport Limited, Mason & Dixon Lines, Inc., Universal Amcan Limited, Romeo Expediters, Inc., Tom Thumb Services, Inc., d/b/a REI, OJ Transport Company, JLAW Enterprises, Inc., OJ Transport, Inc., Michigan Public Service Commission, Michigan Department of Treasury, Michigan Department of Commerce, the State of Michigan, American Trucking Associations, Inc., and TNT Holland Motor Express, Inc. Petitioner TNT Holland Motor Express, Inc. has since become USF Holland, Inc.

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C. The Michigan Court of Appeals correctly held that the four pronged test enunciated in *Complete Auto Transit, Inc. v Brady*, 430 US 274 (1977), *reh den* 430 US 976 (1977), is not applicable to MCL 478.2(1). However, even if *Complete Auto* were to be applied, MCL 478.2(1) is constitutional. 14

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OPINIONS BELOW

The opinion of the Michigan Court of Appeals (Pet. App. 1a-32a) is published and reported as *Westlake Transportation, Inc v Michigan Public Service Comm*, 255 Mich App 589; 662 NW2d 784 (2003). The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal (Pet. App. 61a-63a) is published and reported at 469 Mich 969; 673 NW 2d 752 (2003). The trial court rulings are unpublished.

JURISDICTION

The Michigan Court of Appeals decision was entered on March 11, 2003. The judgment of the Michigan Supreme Court denying Petitioners' Application for Leave to Appeal was entered December 3, 2003. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Michigan Court Rule (MCR) 2.116, provides in relevant part:

> (B) Motion.
>
> (1) A party may move for dismissal of or judgment on all or part of a claim in accordance with this rule. A party against whom a defense is asserted may move under this rule for summary disposition of the defense. A request for dismissal without prejudice under MCL 600.2919c; MSA 27A.2912(3) must be made by motion under MCR 2.116 and MCR 2.119.
>
> * * *
>
> (C) Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:
>
> * * *
>
> (10) Except as to the amount of the damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

Section 478.2(1) of the Michigan Compiled Laws (MCL) provides in relevant part:

> In addition to the license fees or taxes otherwise imposed upon motor carriers, there shall be assessed against and collected from each such motor carrier for the administration of this act, an annual fee of $100.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier[.]

The Commerce Clause of the United States Constitution provides in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

STATEMENT

1. Statutory Framework

Under MCL 478.2(1), motor carriers operating intrastate under a certificate of authority issued by the Michigan Public Service Commission (MPSC) are required to pay annually $100 for each vehicle utilizing that intrastate certificate of authority, even if the vehicle also conducts interstate transportation.

The Michigan Court of Claims, the Michigan Court of Appeals, and the Michigan Supreme Court have all considered Petitioners' claim that MCL 478.2(1) is unconstitutional under the Commerce Clause. Based on the record before them, none of these courts have found any merit to Petitioners' claims.

2. Court Proceedings.

a. Michigan Court of Claims

In *Westlake, et al*, Docket No. 95-15628-CM and *Troy Cab, et al*, Docket No. 95-15631-CM, Westlake and Troy Cab both challenged the lawfulness of the collection of fees pursuant to the Michigan Motor Carrier Act (MCA), MCL 475.1, *et seq.* The Petitioners filed a Motion to Intervene and, on March 8, 1995, the motion was granted. These cases were certified as a class action proceeding on June 9, 1995.

On June 30, 1995, the Petitioners filed their Motion for Partial Summary Disposition seeking a declaration that the $100.00 decal fee imposed by MCL 478.2(1) violated the Commerce Clause of the U.S. Constitution.

On October 13, 1998, the Michigan Court of Claims issued its Opinion, finding that Petitioners' motion was without merit and denying the motion (Pet. App. 33a-45a). The Court granted the State Defendants' Motion for Summary Disposition (Res. App. 1b- 2b). On March 7, 2000 the Court denied Plaintiffs' Motion for Reconsideration (Pet. App. 46a – 60a). Petitioners filed their Claim of Appeal to the Michigan Court of Appeals on March 27, 2000

b. Michigan Court of Appeals.

The Court of Appeals, on March 11, 2003, issued its Opinion in the consolidated appeals. It affirmed in its entirety the Court of Claims summary disposition ruling in favor of the State Defendants, although in reaching the same conclusions on the Commerce Clause allegations its reasoning differed from that of the Court of Claims. The Court of Appeals, 235 Mich App at 619-622, stated:[1]

> [A]ny tax or regulation that affects interstate travel, even if imposed solely on intrastate commerce, is subject to Commerce Clause analysis. *Citizens for Logical Alternatives & Responsible Environment v Clare Co Bd of Comm'rs*, 211 Mich App 494, 499; 536 NW2d 286 (1995). Because the fee is imposed on any vehicle that operates intrastate pursuant to a certificate of authority, even if it also travels interstate, the fee affects interstate commerce, and thus, implicates the dormant Commerce Clause.
>
> * * *
>
> The test for determining whether a regulatory fee violates the Commerce Clause involves a two-tiered

[1] The Respondents' quotation is taken from the official report that commences at 255 Mich App 589. The Petitioner reproduced the Michigan Court of Appeals slip opinion in its Appendix, including several typographical errors that were corrected upon publication. The Respondents, however, will cite the corrected text from the official reporter.

> approach. [fn omitted.] The first step is to determine whether the statute discriminates against interstate interests or merely regulates evenhandedly with only incidental effects upon interstate commerce. *Oregon Waste, supra* at 99. "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* The United States Supreme Court has recognized that there is no clear line separating the two categories. The critical consideration is the overall effect of the statute on both local and interstate activity. *Brown-Forman Distillers Corp v New York State Liquor Auth*, 476 US 573, 579; 106 S Ct 2080; 90 L Ed 2d 552 (1986). A state law will be invalidated if it "discriminates against an article of commerce by reason of its origin or destination out of State." *C & A Carbone, Inc v Town of Clarkstown, New York*, 511 US 383, 390; 114 S Ct 1677; 128 L Ed 2d 399 (1994).
>
> In making this determination, we must consider all the provisions of the challenged statute. MCL 478.2(1) requires that motor carriers that are licensed in Michigan and travel solely intrastate or travel both intrastate and interstate, a "mixed" carrier, must pay a fee of $100 for each vehicle. MCL 478.2(2) requires that motor carriers that are licensed in Michigan and travel solely interstate must also pay the $100 fee. Therefore, the regulatory fee is the same for all motor carriers licensed in Michigan, regardless of their final destination. It does not directly regulate interstate commerce, *Pike v Bruce Church, Inc*, 397 US 137, 142; 90 S Ct 844; 25 L Ed 2d 174 (1970), nor is economic protectionism at issue, *Arkansas Electric Coop Corp v Arkansas Pub Service Comm*, 461 US 375, 394; 103 S Ct 1905; 76 L Ed 2d 1 (1983).
>
> * * *
>
> Having concluded that the statute regulates even-handedly, it will be upheld unless the burden it imposes

on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike, supra* at 142. Intervening plaintiffs do not contest that the statute serves a legitimate non-discriminatory purpose, i.e., funding safety and related regulations. This is an exercise of the State's police power and serves a critical function in protecting the people who use Michigan's highways. Great deference is given to state legislation in the field of highway safety regulation and a strong presumption in favor of its validity exists. *Raymond Motor Transportation, Inc v Rice*, 434 US 429, 443; 98 S Ct 787; 54 L Ed 2d 664 (1978). On the basis of the record before us, we cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways. Therefore, we hold that MCL 478.2(1) does not violate the Commerce Clause.

On April 1, 2003, Petitioners American Trucking Associations, Inc. and TNT Holland Motor Express, Inc. filed an application for leave to appeal with the Michigan Supreme Court.

c. Michigan Supreme Court

On December 3, 2003, the Michigan Supreme Court denied the applications for leave (Pet. App. 61a – 63a).

REASONS FOR DENYING THE PETITION

The decision of the Michigan Court of Appeals is correct and does not conflict with any decision of this Court or with the decisions from other states or jurisdictions.

A. Under Michigan Court Rule 2.116(C)(10), a motion for summary disposition is properly granted against a party when that party fails to present evidence to support its claim. The Petitioners failed to present evidence to support their claim that Michigan Compiled Law 478.2(1) violated the Commerce Clause. After determining that the Petitioners' claim was "a matter of pure speculation" the Michigan Court of Appeals properly affirmed the trial court's grant of summary disposition against Petitioners.

The Commerce Clause violation alleged by the Petitioners is, as was noted below by the Michigan Court of Appeals (255 Mich App at 621), one of pure speculation:

> Intervening plaintiffs argue that the mixed carrier invariably will pay a higher per-mile fee than the carrier who operates solely intrastate. They assert that because the fee is a flat annual fee, in order to receive the greatest benefit for the fee, a carrier would need to maximize its intrastate operations and this could potentially affect a carrier's economic decisions by discouraging an intrastate carrier from engaging in interstate commerce.
>
> While this may be so, it is a matter of pure speculation. Intervening plaintiffs present no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could occur in a hypothetical case. Only one affidavit was submitted by intervening plaintiffs, in which James Crozier, manager of licensing and fuel for intervening plaintiff TNT Holland Motor Express, Inc., stated that mixed carriers often top off their interstate loads with intrastate

> hauls or transport intrastate loads in between interstate hauls. However, he never averred that this was done only because of the fee imposed by MCL 478.2(1). Regardless of the $100 fee, topping off loads or adding intrastate hauls in between interstate ones is an economically efficient decision for the motor carriers. We do not find that the fee raises a significant barrier to participation in interstate trade. Any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination.

In short, the Petitioners failed to present evidence sufficient to support its claim that the challenged Michigan law violates the Commerce Clause. As the Michigan Court of Appeals opinion demonstrates the Petitioners failed to establish a nexus between the harm alleged (which was unproven)[2] and the statute which it challenged. As a result the trial court properly granted summary disposition to the Respondents pursuant to Michigan Court Rule (MCR) 2.116(C)(10).[3]

In the Michigan trial courts, a motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim and is reviewed de novo by Michigan courts on appeal. *Spiek v Dept of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). In *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), the Michigan Supreme Court addressed the legal standard under which motions brought pursuant to MCR 2.116(C)(10) are to be decided, as follows:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for

---

[2] Even the $70 million amount that Petitioners assert is the amount at issue in this litigation (Pet. 26) is not supported by the record.

[3] MCR 2.116(C)(10) provides:

> Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

> summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(5).
>
> A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.
>
> Today we clarify the correct legal standard under MCR 2.116(C)(10) because our Court has inconsistently applied the standard since the 1985 amendment of the court rules. The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. [Citations omitted.]

Thus even if the Petitioners had stated a *prima facie* case when before the trial court they were also required to show there is a genuine issue of material fact, of an undue burden on interstate commerce that is based on something more than mere conjecture. This the Petitioners failed to do. *Durant v Stahlin*, 375 Mich 628, 638; 135 NW2d 392 (1965); *Anderson v Kemper Insurance Co.*, 128 Mich App 249, 252-253; 340 NW2d 87 (1983). Therefore, under the Michigan Court Rules, a party, when challenged, must show that it has a case on the law *and* that there is some evidentiary proof of specific facts to support its allegations. *Durant* at 638; *Remes v Dobys*, 87 Mich App 534,

537-538; 274 NW2d 64 (1978). If a party opposing a MCR 2.116(C)(10) motion fails to present such evidentiary proofs, summary disposition is properly granted. *Smith v Globe Life Ins Co.*, 460 Mich 446, 455-456 n2; 597 NW2d 28 (1999). Having waived the opportunity to present evidence to support their claim, Petitioners should neither be allowed to avoid MCR 2.116(C)(10) nor be heard to complain.

B. MCL 478.2(1) does not violate the Commerce Clause.

Section 478.2(1) of the Michigan Compiled Laws provides in relevant part:

> In addition to the license fees or taxes otherwise imposed upon motor carriers, there shall be assessed against and collected from each such motor carrier for the administration of this act, an annual fee of $100.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier[.]

Petitioners assert that collecting the $100 fee from a motor carrier vehicle that provides both intrastate and interstate transportation violates the Commerce Clause.

The Commerce Clause provides that Congress "shall have power. . . [t]o regulate commerce. . . among the several states. . . ." US Const, art I, § 8, cl 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc v Dept of Environmental Quality of the State of Oregon*, 511 US 93, 98 (1994).

In analyzing whether a state statute violates the Commerce Clause, this Court in *Oregon Waste, supra,* 99 stated:

> Consistent with these principles, we have held that the first step in analyzing any law subject to judicial scrutiny

> under the negative Commerce Clause is to determine whether it "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Hughes, supra, at 336.* See also *Chemical Waste, 504 U.s. at 340-341.* As we use the term here, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid. *Id., at 344, n. 6.* See also *Philadelphia v. New Jersey, 437 U.S. 617, 624, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978).* By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970).*

In determining that MCL 478.2(1) was not discriminatory, the Michigan Court of Appeals stated:

> In making this determination, we must consider all the provisions of the challenged statute. MCL 478.2(1) requires that motor carriers that are licensed in Michigan and travel solely intrastate or travel both intrastate and interstate, a "mixed" carrier, must pay a fee of $ 100 for each vehicle. MCL 478.2(2) requires that motor carriers that are licensed in Michigan and travel solely interstate must also pay the $ 100 fee. Therefore, the regulatory fee is the same for all motor carriers licensed in Michigan, regardless of their final destination. It does not directly regulate interstate commerce, *Pike v Bruce Church, Inc.*, 397 US 137, 142; 90 S Ct 844; 25 L Ed 2d 174 (1970), nor is economic protectionism at issue, *Arkansas Electric Co-op Corp v Arkansas Pub Service Comm*, 461 US 375, 394; 103 S Ct 1905; 76 L Ed 2d 1 (1983). 255 Mich App at 620.

In presenting its case at the state level, the Petitioners failed to present evidence demonstrating the discriminatory nature of the $100 fee. They only posed a number of hypotheticals and asked the Michigan courts to accept the hypotheticals as fact. This pattern has continued in their petition. For example, Petitioners' discussion on page 3 of an interstate carrier making a single intrastate delivery is not supported in the record below. On page 22, Petitioners stated, "[o]n average, a trucking company that confines its operations to intrastate travel will drive for more miles within the taxing state and will obtain a vastly greater benefit from its intrastate fee than will a company that travels both intra- and interstate." There is no evidentiary support in the record for this assertion.

The discussion on pages 6 and 7 asserting the fee is discriminatory does not rely on facts in the record but, rather quotes, out of context, language from the Michigan Court of Appeals. The Michigan Court of Appeals concluded that Petitioners presented no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could happen in the hypothetical. "We do not find that the fee raises a significant barrier to participation in interstate trade. Any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination." 255 Mich App at 621.

Having found the effect of the fee did not rise to the level of discrimination, the Michigan Court of Appeals examined the burden the fee imposes on interstate commerce. In evaluating the burden on interstate commerce, this Court in *Pike v Bruce Church, Inc*, 397 US 137, 142 (1970), stated:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co v Detroit,* 362 US 440, 443; 4 L Ed 2d 852,

> 856; 80 S Ct 813; 78 ALR 2d 1294. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with less impact on interstate activities.

This balancing test inherently recognizes that state regulation may have some effect upon interstate commerce, yet such regulation will not be invalid for that reason alone. Rather, the test balances the local and interstate interests involved.

MCL 478.2(1) constitutes a valid exercise of the state's police power. This Court has declared that the Commerce Clause does not withhold from the states the power to regulate matters of local concern where Congress has not exercised its power, even though the regulation affects interstate commerce. In *Lewis v BT Investment Managers, Inc,* 447 US 27, 35-36 (1980), this Court stated that the Commerce Clause "limitation upon state power . . . is by no means absolute" and that "[i]n the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected," citing *Raymond Motor Transportation, Inc v Rice,* 434 US 429, 440 (1978), and *Great A & P Tea Co v Cottrell,* 424 US 366, 371 (1976).

As the Michigan Court of Appeals noted, the Petitioners, "do not contest that the statute serves a legitimate non-discriminatory purpose, i.e., funding safety and related regulations." 255 Mich App at 622. In *Huron-Portland Cement Co v Detroit,* 362 US 440 (1960), this Court held that a local air control ordinance was not unconstitutional as a burden on interstate commerce when it was applied to steam vessels operating in interstate commerce that were licensed and comprehensively regulated by the federal government. The Court found that the city code was an exercise of the police power, and that "[t]he mere possession of a federal license . . . does not immunize a ship from the operation of the

normal incidents of local police power, not constituting a direct regulation of commerce." (362 US at 447) The Court concluded that "[s]tate regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." (362 US at 448)[4]

MCL 478.2(1), directed to intrastate authority and the associated fee, represents a valid exercise of the state's police powers intended to accomplish legitimate local purposes relating to intrastate transportation. MCL 478.2(1) does not have a purpose of regulating interstate operations or vehicles, and if at all, only minimally or incidentally affects interstate commerce.

C. The Michigan Court of Appeals correctly held that the four pronged test enunciated in *Complete Auto Transit, Inc. v Brady*, 430 US 274 (1977), *reh den* 430 US 976 (1977), is not applicable to MCL 478.2(1). However, even if *Complete Auto* were to be applied, MCL 478.2(1) is constitutional.

Petitioners assert that the Michigan Court of Appeals erred by not applying an analysis under *Complete Auto Transit, Inc. v Brady*, 430 US 274 (1977) *reh den* 430 US 976 (1977). The Michigan Court of Appeals disagreed, 255 Mich App 619, n 15, stating:

> Intervening plaintiffs contend that the four-pronged test enunciated in *Complete Auto Transit, Inc v Brady*,

[4] This Court, on numerous occasions, has similarly held that a state statute passed pursuant to the legitimate use of the state's police powers is not a burden on interstate commerce although it may affect commerce. See, *Savage v Jones*, 225 US 501 (1912); *Bradley v Ohio Public Utilities Comm*, 289 US 92 (1933); *Kelly v Washington*, 302 US 1 (1937); *South Carolina State Hwy Dep't v Barnwell Bros*, 303 US 177 (1938); *Southern Pacific Co v Arizona ex rel Sullivan*, 325 US 761 (1945); *Panhandle Eastern Pipe Line Co v Indiana Public Service Comm*, 332 US 507 (1947); *Head v New Mexico Board of Examiners in Optometry*, 374 US 424 (1963).

> 490 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 926 (1977), and utilized in *American Trucking Ass'ns, Inc. v Scheiner*, 483 US 266, 283; 107 S Ct 2829; 97 L Ed 2d 226 (1987), is applicable. However, this test is used to analyze the constitutionality of state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, *Complete Auto*, *supra*, at 279, not regulatory statutes.

Yet, even under the *Complete Auto Transit* analysis, Petitioners' arguments fail.

Even assuming, as Petitioners do, that the fee in this case is a tax, it still remains that Michigan's challenged intrastate fees are also constitutional under *Complete Auto Transit, supra.* In *Complete Auto Transit,* this Court addressed a Commerce Clause challenge to a Mississippi tax for the privilege of carrying on, within the state, certain activities related to a corporation's operation of an interstate business. The appellant, Complete Auto Transit, Inc., was a Michigan corporation engaged in the business of transporting motor vehicles by motor carrier for General Motors who assembled the vehicles outside of Mississippi and then shipped them by rail to Jackson, Mississippi, where they were loaded onto appellant's trucks and transported by appellant to Mississippi dealers within the state. The tax in question was a 5% Mississippi sales tax assessed against Complete Auto Transit, Inc. for the transportation of property for-hire between points within the State of Mississippi. Complete Auto Transit, Inc. argued that the 5% tax on gross income of its intrastate business was unconstitutional as applied to its operations in interstate commerce. Complete Auto Transit claimed that its transaction was but one part of an interstate movement. This Court upheld the Mississippi tax using a four-part test.

This test was articulated in *Goldberg v Sweet,* 488 US 252, 257 (1989), as follows:

> Under the four-pronged test originated in *Complete Auto*, a state tax will withstand scrutiny under the Commerce Clause if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

Applying each part of that test to the fee challenged by the Petitioners leads but to one conclusion, i.e. the fee does not violate the Commerce Clause.

1. MCL 478.2(1) applies to an activity having a substantial nexus with Michigan.

The first part of the four-pronged test enunciated in *Complete Auto Transit, Inc, supra,* requires a Court to determine whether the tax is applied to an activity having a substantial nexus with Michigan. Petitioners do not challenge the substantial nexus requirement. Since MCL 478.2(1) charges motor carriers $100 for each vehicle the motor carrier chooses to assign for intrastate operations only, the fee has the strongest possible nexus with Michigan. This is particularly true since intrastate transportation is defined as the pick-up of persons or property from a point in the state to delivery of the persons or property to a point in the state, without a prior or subsequent interstate move.

Even the hypothetical scenario that in conducting interstate operations a carrier may wish to make a purely intrastate pick-up and delivery in Michigan does not change the fact that MCL 478.2(1) applies only to the intrastate activity of the vehicle.

2. MCL 478.2(1) is fairly apportioned.

The second prong of the *Complete Auto* test requires a Court to determine whether the fees under MCL 478.2(1) are fairly apportioned. In *Goldberg, supra*, this Court stated, "The central purpose behind the apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction."

The Court in *Container Corp v Franchise Tax Board,* 463 US 159, 164 (1983) noted that the apportionment determination "is often an elusive goal, both in theory and in practice."

In the present case, MCL 478.2(1) is internally consistent because no more than 100% of a carrier's intrastate activity is being taxed. If every state in the Union were to impose an identical fee to that contained in MCL 478.2(1), no multiple taxation violating the Commerce Clause would result for the reason that each separate state would only be charging for intrastate operations in that same state.

In *Oklahoma Tax Comm v Jefferson Lines, Inc,* 514 US 175 (1995), the Supreme Court reviewed Oklahoma's state's sales tax on bus tickets sold in Oklahoma for interstate travel based upon the four-pronged test of *Complete Auto Transit, supra.* Jefferson Lines, a Minnesota corporation, provided bus services as a common carrier in Oklahoma without remitting the 4% sales tax for tickets it had sold in Oklahoma for bus travel from Oklahoma to other states, although it did collect and remit the taxes for all tickets it had sold in Oklahoma for travel that originated and terminated within that state.[5] Since Jefferson Lines did not challenge the tax on intrastate operations, the Supreme Court reviewed the interstate portion of the tax under the four-pronged test of *Complete Auto Transit, supra.* In applying the second prong of the *Complete Auto* test to Oklahoma's sales tax on bus tickets sold in Oklahoma for interstate travel originating there, this Court stated, 514 US at 185, as follows:

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[5] For purposes of understanding the dichotomy between interstate and intrastate transactions, it is interesting to note that Petitioners challenge the fee imposed for intrastate operations pursuant to MCL 478.2(1), but has not argued in this case that the $100 vehicle fee imposed on interstate carriers for vehicles registered and commercially plated with the Michigan Secretary of State pursuant to MCL 478.2(2) is in violation of the Commerce Clause. Jefferson Lines did not challenge Oklahoma's sales tax on bus tickets for travel intrastate, but did challenge the sales tax on bus tickets for travel interstate.

Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax. See *Gwin, White and Prince,* 305 US at 439. There is no failure of it in this case, however. If every state were to impose a tax identical to Oklahoma's, that is, a tax on ticket sales within the state for travel originating there, no sale would be subject to more than one state's tax.

If the Oklahoma sales tax on the interstate transaction was internally consistent, then it stands to reason that the unchallenged Oklahoma sales tax on intrastate bus travel would also have met the test. The above-referenced explanation by the Supreme Court in the case indicates that internal consistency is a test that compares the burden on interstate commerce to the burden imposed by each individual state. Each state could charge a fee or tax for intrastate operations and be properly apportioned and internally consistent because the burden is on intrastate commerce and not interstate commerce. Petitioners refer to the "potentially crushing, cumulative burdens on trucks traveling in interstate commerce," (Pet. 11), but point to no facts in the record that demonstrate this "crushing" burden. Challenging MCL 478.2(1) as placing an undue burden on interstate commerce seems inappropriate under the Commerce Clause. At the very least, any such burden could only be found in a truly

extraordinary or unique case, with well-proven facts, which certainly does not exist here.

For a state tax to be properly apportioned within the meaning of the second prong of *Complete Auto's* test, "the central purpose [of which] is to ensure that each state taxes only its fair share of an interstate transaction," *Goldberg, supra,* 488 at 260-261, the tax must also be externally consistent. The Supreme Court in *Oklahoma Tax Comm* explained, 514 US at 185, external consistency as follows:

> External consistency, on the other hand, looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed, to discover whether a state's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State.

As the Supreme Court in *Western Live Stock v Bureau of Revenue,* 303 US 250, 254 (1938), "it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business."

In the present case, since no other state is responsible for promoting safety upon and conserving the use of Michigan's highways and the fee imposed pursuant to MCL 478.2(1) is aimed at purely intrastate operations, it is a fair apportionment that Michigan keep 100% of the fee imposed.

3. MCL 478.2(1) does not discriminate against interstate commerce.

The third prong of the *Complete Auto* test requires a Court to determine whether MCL 478.2(1) discriminates against interstate commerce.

Since MCL 478.2(1) imposes a $100 fee on vehicles a motor carrier chooses to utilize to conduct intrastate operations, MCL

478.2(1) cannot be said to be facially discriminatory against interstate commerce. To the contrary, the fee imposed by MCL 478.2(1) is obviously upon intrastate commerce.

Again, since MCL 478.2(1) imposes a fee upon motor carriers who choose to engage in intrastate operations by specific vehicles registered for that purpose it cannot be said to have a discriminatory purpose aimed at interstate commerce. Under Michigan's fee system, motor carriers and their vehicles that are subject to the important safety-related purposes accomplished by the regulatory statutes, framework, and activities, have a close nexus to the state. So, they are required to pay more than motor carriers whose nexus to Michigan is less.

The motor carrier chooses where it will conduct business, the state in which a vehicle is plated, and the use of that vehicle in a given state. Each motor carrier also makes its own good-faith selection of those vehicles it designates as being utilized for intrastate transportation.

Thus, the fees charged for vehicles utilized in intrastate operations cannot be said to discriminate against interstate commerce for purposes of the third prong of the *Complete Auto* test.

4. MCL 478.2(1) is fairly related to the services provided by the State.

The fourth prong of the *Complete Auto* test requires a Court to determine whether the collection of fees pursuant to MCL 478.2(1) are fairly related to the services provided by Michigan.

MCL 478.2(1) expressly states that:

> [i]n addition to the license fees or taxes otherwise imposed upon motor carriers, there shall be assessed against and collected from each motor carrier for the **administration of this act**, an annual fee of $100 for each self-propelled motor vehicle... [emphasis added].

The purpose of the Motor Carrier Act, 1933 PA 254, MCL 475.1, *et seq*, is "to promote safety upon and conserve the use of public highways of the state; . . . ." The purpose and policies section of the statute found at MCL 475.2 states in pertinent part supporting the title's purpose as follows:

> It is hereby declared to be the purpose and policy of the legislature in enacting this law to confer upon the [Michigan Public Service] Commission the power and authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to: (a) relieve all future undue burdens and congestion on the highways arising by the use of the highways by motor vehicles operated by motor carriers; (b) protect and conserve the safety and welfare of the traveling and shipping public in their use of the highways; . . .

The Michigan Public Service Commission[6] and Michigan State Police[7] work closely together to jointly enforce several state safety acts. The fees are utilized to cover the cost of this important regulatory function. No evidence or facts have been presented to suggest that the fees have not been fairly apportioned or allocated for these regulatory purposes. Moreover, it must also be realized that the fees are proper to ensure that the motor carriers most directly using the state's roads and services pay their fair share. No immunity to paying a fair share of important benefits provided at public expense is accorded a company or business activity merely because it engaged in some interstate commerce or is a multi-state company or activity.

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[6] Affidavit of Thomas R. Lonergan (Res. App. 14b-27b).

[7] Affidavit of Timothy J. Yungfer (Res. App. 28b-37b).

The fees collected under MCL 478.2(1) fully satisfy the four-prong *Complete Auto Transit* test.

D. MCL 478.2(1) does not conflict with this Court's decision in *Scheiner*.

In *American Trucking Ass'ns v Scheiner*, 483 US 266 (1987), this Court found that a flat marker fee and a flat axle tax assessed by Pennsylvania on each truck traveling through the state -- whether registered there or not -- violated the Commerce Clause.

The flat taxes were alleged to be in violation of the Commerce Clause in part because they imposed a substantially higher effective rate on trucks registered outside of Pennsylvania, with the lower effective tax rate inuring to the benefit of the local truckers. Quoting *Boston Stock Exchange v State Tax Comm*, 429 US 318, 329 (1977), the Court in *Scheiner* noted that "[p]ermitting the individual States to enact laws that favor local enterprises at the expense of out-of-state business 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." 483 US at 269, n 1. In this context, the Court added that "the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among the States." 483 US at 282.

The Michigan fee attacked by Petitioners does not resemble the fees in *Scheiner*. While the flat marker fee and flat axle tax in *Scheiner* applied to all trucks traveling through Pennsylvania, Michigan's fee under MCL 478.2(1) relates to only those vehicles assigned by the carrier to haul intrastate loads. Vehicles handling only interstate loads do not pay a fee under MCL 478.2(1). Multiple fees do not result because an intrastate vehicle is confined to Michigan use. Michigan's regulatory statutes and fees do not relate to or adversely affect the Federal Highway Administration (FHA) interstate authority. Thus, unlike *Scheiner*, where an interstate vehicle could be subject to multiple axle taxes (if all states enacted them), regardless of how little travel was

made in a state, Michigan's fees cannot result in multiple fees for interstate transportation and thus, no discriminatory impact can result. If the carrier elects to conduct intrastate transportation in multiple states, then it may be subject to additional state fees. But, such a hypothetical is not addressed by *Scheiner*. Michigan's fees also do not contain the discriminatory discount feature in *Scheiner* given to in-state vehicles.

Finally, even if Michigan's fee structure is a "flat tax," it also falls within the exception allowing such flat assessments in *Scheiner*. In this regard, *Scheiner* recognizes that even if the existing fee structure were to contain some elements of discrimination, that does not automatically render it unconstitutional. In this regard, *Scheiner* notes that where the alternative, even a "flat tax" alternative, is the only "practicable means of collecting revenues from users and the use of a more finely gradated user fee schedule would pose genuine administrative burdens," the flat tax alternative is constitutional. 483 US at 296.

Michigan's regulatory fee is fully consistent with *Aero Mayflower Transit Co v Board of RR Comm'rs*, 332 US 495 (1947), and *Capitol Greyhound Lines v Brice*, 339 US 542 (1950). In *Aero Mayflower Transit Co v Board of RR Comm'rs*, 332 US 495 (1947), *supra*, in which the U.S. Supreme Court rejected a claim that a minimum fee of $15 in a fee structure based on gross receipts was unreasonable even though that would result in a tax fifteen times greater than if the standard percentage calculation had been used. The Court stated:

> [The] Federal Constitution does not require the state to elaborate a system of motor vehicle taxation which will reflect with exact precision every gradation in use. In return for the $15 fee appellant can do business grossing $3,000 per vehicle annually for operating on Montana roads. Appellant was not wronged by its failure to make the full use of the highways permitted. (332 US at 506, n 19).

The *Scheiner* court noted:

> Our disposition [in *Aero, supra*] was thus based on the costs the State would encounter in collecting taxes for vehicles that earned less than $3,000 annually in Montana. (483 US at 296, n 26).

The other case cited by the *Scheiner* Court in support of its proposition that all flat taxes are not unconstitutional is *Capitol Greyhound Lines v Brice,* 339 US 542 (1950), in which the Court upheld a 2% fee on the fair market value of motor vehicles for the use of state highways:

> because of the administrative burden of applying a tax formula that would vary "with every factor affecting appropriate compensation for road use." [483 US at 296, n 26, quoting 339 US at 546.]

As in *Brice,* many of the costs the Commission incurs in the regulatory process are caused by various factors. As in *Brice,* the regulatory fee is not invalid.

Scheiner, Aero Mayflower, and *Brice* therefore collectively stand for the proposition that a state need not devise a regulatory fee that precisely matches the revenues generated from each fee payer with the burdens placed on the state by that fee payer. There has never been a constitutional requirement that the assessments paid by an individual to a government, whether fees or taxes, precisely offset the benefits that each person derives from the government. Such governmental precision is neither practical nor desirable.

In summary, even if the fee imposed under MCL 478.2(1) is considered to be a tax, it still is not unconstitutional under the Commerce Clause as it is not in conflict with either *Complete Auto Transit, supra,* or *Scheiner, supra.*

E. The conflict alleged by the Petitioners does not warrant this Court's review.

The Petitioners claim that the Michigan Court of Appeals decision cannot be reconciled with three decisions that applied the internal consistency test "even when the tax was enacted for ostensibly regulatory purposes and even if it was denominated a 'fee.'" (Pet. 18). The charges that were assessed in those three cases, however, bear little similarity to and were of an entirely different character than the fee challenged here. In short the difference in the facts renders those cases inapposite.

Two of the cases, *American Trucking Ass'ns v Secretary of Administration,* 613 NE2d 95 (Mass 1993) and *American Trucking Ass'ns v Secretary of State,* 595 A2d 1014 (Me 1991), involved an annual per truck charge for every truck that transported hazardous waste on highways in the respective states of Massachusetts and Maine.

The charge was assessed against all trucks hauling hazardous waste, regardless of whether the hazardous waste was being transported interstate or intrastate. Thus, it was readily apparent that the states of Massachusetts and Maine were levying a charge to engage in interstate commerce within the boundaries of their states. That is not the case here. The challenged fee in the present case in no way levies a charge on motor carriers to engage in interstate commerce on the highways in Michigan.

Similarly, the third case cited by the Petitioners, *Government Suppliers Consolidating Sers Inc v Bayh,* 975 F2d 1267 (7th Cir, 1992), directly levied a charge on engaging in interstate commerce within the State of Indiana. There, Indiana had enacted legislation that provided, "not only for fees that apply uniformly to all waste, regardless of origin, but also for fees that apply only to waste generated outside Indiana." *Id.* at 1271. Thus, the Indiana statute evidenced a clear discriminatory purpose, i.e. to discourage or prevent the hauling of solid waste into Indiana. Unlike the Indiana fee the Michigan fee challenged

by the petitioners neither varies in amount nor does it evidence a discriminatory purpose.

In light of the foregoing, it is clear that the conflict alleged by the Petitioners does not warrant this Court's review.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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Dated: April, 2004

APPENDIX

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al.,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs,

DOCKET NO. 95-15628-CM

-vs-

MICHIGAN PUBLIC SERVICE COMMISSION, et al,

OPINION

Defendants.

TROY CAB, INC., et al,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs,

DOCKET NO. 95-15631-CM

-vs-

STATE OF MICHIGAN, et al.,

OPINION

Defendants.

Before the Court in these consolidated class actions are three motions for partial summary disposition brought by Plaintiffs and Intervening Plaintiffs. All Plaintiffs collectively challenge the constitutionality and lawfulness of certain fees imposed on the trucking industry by Michigan statutes as administered by the Public Service Commission. The constitutional challenges are brought under both the federal and state constitutions, although those brought under Michigan fundamental law and not the subject of these motions. The nonconstitutional claims are predicated on federal statute and assert that the challenged fees violate such supreme law and thus must be enjoined.

The fees here challenged are mandated by Michigan's Motor Carrier Act (MCA or Act), 1933 PA 254 as amended, MCL 475.1, et seq; MSA 22.531, et seq. They are three in number and are delineated in two sections of article IV of the Act.

First there is the intrastate authority fee of $100.00 required when submitting to the Public Service Commission (PSC or Commission) or application for a certificate of authority or a permit, whether granted or not. that application fee is authorized by article IV, section 1 of the Act, MCL 478.1; MSA 22.560.

Second, section 2 of article IV, MCL 478.2; MSA 22.561, mandates annual fees of $100.00 for each motor vehicle operated by a motor carrier. Subsection (1) applies that requirement "for the administration of this act" to each vehicle used in intrastate service. Subsection (2) makes the same requirement applicable to each vehicle "registered in this state and operating entirely in interstate commerce" by a "motor carrier licensed in this state."

According to Plaintiffs, all three fees are unlawful because they, and especially the intrastate vehicle fee

authorized by section 2(1), have been preempted by federal law. Further, they assert that the section 2(2) fee on each Michigan-registered vehicle operated entirely in interstate commerce by a Michigan-licensed motor carrier contravenes another provision of federal law that created the Single State Registration System for motor carriers in interstate commerce. Finally, they complain also that the section 2(1) fee imposed on vehicles operated in intrastate service offends the dormant Commerce Clause of the United States Constitution by discriminating against foreign motor carriers operating substantially in interstate commerce. The Court will treat each claim in order, beginning with that on which Plaintiffs primarily rely.

FEDERAL PREEMPTION

Federal preemption has its origin in the Supremacy Clause of the US Const, art VI, which declares that the laws of the United States "shall be the supreme Law of the Land." However, federal provisions that invalidate state law must be narrowly tailored to support a presumption against preemption of state law. Ryan v Brunswick Corp, 454 Mich 20, 27; 557 NW2d 541 (1997). State police powers are not superseded by federal provisions unless that is the clear and unequivocal intent of Congress. Id. This is especially true of state regulation of matters relating to health and safety. Id. The plain meaning of federal provisions must be given effect unless there is reason to think Congress intended a more restrictive reading. Id, p 28. Courts must seek the congressional intent from the text, structure and purpose of the federal provision as a whole. Id. Such considerations include "'the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.'" Id, quoting Medtronic, Inc v Lohr, 518 US ___; 116 S Ct 2240; 2251; 135 L Ed 2d 700 (1996).

The Federal Aviation Administration Authorization Act of 1994 (FAAAA), PL 103-305, contains § 601, which added

subsection (h), "Preemption of State economic regulation of motor carriers," to 49 USC 11501, subsequently recodified as 49 USC 14501.[1] By virtue of § 601, effective January 1, 1995, the FAAAA preempts state economic regulation of motor carriers by providing that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier. . . or any motor private carrier with respect to the transportation of property." 49 USC 11501(h)(1), now recodified as 49 USC 14501(c)(1). Such language clearly and expressly prohibits a state from enacting or enforcing laws related to economic aspects of the service provided by a motor carrier. See Fitzpatrick v Simmons Airlines, Inc, 218 Mich App 689, 691; 555 NW2d 479 (1996). The question then becomes whether Michigan's MCA is a law related to the price, route or service of a motor carrier. Id.

In Morales v Trans World Airlines, Inc, 504 US 374, 383; 112 S Ct 2031; 119 L Ed 2d 157 (1992), the United States Supreme Court concluded that, as used in a similar statute respecting the service of air carriers, the phrase "relating to" expressed a broad preemptive congressional purpose. See In Re Federal Preemption of Provisions of the Motor Carrier Act, 223 Mich App 288, 300-301; 566 NW2d 299 (1997), lv den 458 Mich 852 (1998); Fitzpatrick, supra. Morales, p 384, determined that state laws have a "connection with" or "reference to" airline services were "related to" the federal act for purposes of preemption. See Fitzpatrick, p 692. Indeed, Morales, p 384, rejected the view that the federal act's preemptive scope is limited to state laws specifically addressed to the air carrier industry, ruling instead that a state law may be preempted even if it is not designed to affect the area of

[1] The entirety of this preemption provision is quoted in In Re Federal Preemption of Provisions of the Motor Carrier Act, 223 Mich App 288, 293-294; 566 NW2d 299 (1977), lv den 458 Mich 852 (1998).

preemption or its effect on that area is only indirect.[2] Morales held, p 391, that a state law requiring truth-in-advertising of air fares was related to the price and service of carriers and was therefore preempted by the federal act. Accord American Airlines, Inc v Wolens, 513 US 219; 115 S Ct 817; 130 L Ed 2d 715, 724-725 (1995): state consumer fraud law is preempted where applied to rates and services of airline frequent-flyer programs. Thus, the Fitzpatrick court held, supra, that fidelity to the broad interpretation rendered by the United States Supreme Court in Morales required the conclusion that judicial enforcement of the Michigan Civil Rights Act to protect against employment discrimination in the air carrier industry was likewise preempted.[3]

If federal legislation preempts some applications of the Michigan Civil Rights Act to the employment practices of air carriers in this state, as ruled in Fitzpatrick, then a fortiori the same preemptive effect of the FAAAA must apply to any economic regulation imposed on motor carriers by the MCA.[4]

[2] On the other hand, Morales, p 390, left room for state actions "too tenuous, remote, or peripheral" to have preemptive effect -- without, however, explaining what was meant by those terms of qualification or how they should be applied to "a border-line question." Rather, Morales said only that "we express no views about where it would be appropriate to draw the line." Id, quoting Shaw v Delta Air Lines, Inc, 463 US 85, 100 n 21; 103 S Ct 2890; 77 L Ed 2d 490 (1983).

[3] That ruling was recently limited by Gilman v Northwest Airlines, Inc, 230 Mich App 293, 303-304; ___ NW2d ___ (1998), which held that the same federal statute does not preempt the Michigan Civil Rights Act prohibitions of age and sex discrimination because those employee characteristics have no apparent connection or relation to an airline's routes, prices or services. Gilman, at 298-300, distinguished Fitzpatrick, supra, which had dealt only with height and weight discrimination in employment.

[4] The PSC acknowledges such preemptive effect on specific provisions of the MCA and has ceased to enforce those sections it considers preempted. Thus, the PSC no longer requires applicants for certificates of authority to present evidence that their proposed service will serve a required public purpose without creating excess service. It no longer mandates that carriers avoid predatory pricing practices or file tariff schedules. Similarly, it no longer exercises its authority under the MCA to determine reasonable and

Thus, the question is whether the Michigan requirements challenged here, viz., the fees authorized by art IV, §§ 1 & 2 of the MCA, are manifestations of economic regulation. If so, they are preempted. If not, they may still be preempted if related, no matter how indirectly, to the price, route or service of a motor carrier. See Morales, supra, p 386. However, where such indirect relationship is "too tenuous, remote, or peripheral" to implicate preemption, the state legislation may be permitted to stand unaffected by the national policy of economic deregulation. Id, p 390.

While the tenuousness of peripherality of an "indirect relationship" has not been expressly addressed, there are some indications that it need not be particularly remote from the preempted field. For instance, in American Airlines v Wolens, supra, 130 L Ed 2d at 726 n 5, the United States Supreme Court endorsed the view that "the ban on enacting or enforcing any [state] law 'relating to rates, routes, or services' is most sensibly read, in light of the [federal law's] overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation on the operation of an air carrier.'" That view was prefigured in Morales, supra, p 378, which recognized that the federal law was designed to place "maximum reliance on competitive market forces" under a uniform national regime of economic deregulation, i.e., "[t]o ensure that the States would not undo federal deregulation with regulation of their own." Thus, that federal enactment, as American Airlines stated at 728, "stops States from imposing their own substantive standards with respect to rates, routes, or services." That would suggest that the fees challenged here are not preempted by § 601 since they impose on motor carriers no particular "substantive standards" of competition or regulation.

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sufficient rates, fares, charges and classifications or to penalize unlawful discrimination. See In re Federal Preemption, supra, p 297.

The Commission's determinations regarding the effect of § 601 on the MCA were summarized recently in In re Federal Preemption, supra, p 295:

> "The PSC concluded that § 601 preempts only regulatory provisions concerning price, routes, and service -- the essence of economic regulation. The PSC found it had substantial residual regulatory authority, including regulatory authority over matters such as safety. The PSC further concluded that it should continue a certification process (albeit, a 'streamlined' certification process) for intrastate motor carriers and that it could and should continue to assess statutorily mandated fees. ... Since issuing its decisions, the PSC has ceased enforcing those provisions of the Motor Carrier Act that it concluded had been preempted."

Thus federal preemption under § 601 and the Commission's decisions applying that federal principle to the MCA have substantially altered the regulatory framework for the trucking industry in Michigan. Id, p 298.

Even so, the court in In re Federal Preemption, p 301, ruled that much of the MCA survives the federal preemption statute:

> "[I]t is clear and unambiguous from the language of § 601 that the congressional intent was not to preempt all state regulation of the trucking industry. Section 601 expressly excepts from its preemptive effect significant aspects of regulation, including safety regulation, regulation of size and weight of vehicles, regulation of insurance requirements, and regulation of the transportation of household goods. If the language of a statute is clear and unambiguous, the plain meaning of the

> statute reflects the legislative intend. ... Furthermore, the House Conference Report indicates that 'economic regulation' is intended to be preempted and that states retain their authority to regulate various aspects of the transportation industry. See H R Conf Rep No 677, 103d Cong, 2d Sess, pp 84-85. ... The argument that Congress intended to preempt the entire field of regulation of motor carriers fails in the face of the language of the legislation and its history. The PSC's determination that § 601 was intended to preempt only economic regulation is consistent with the language and history of the legislation."

See also Michigan Trucking Ass'n v Public Service Comm (On Remand), 225 Mich App 424, 427-429; 571 NW2d 734 (1997).

Significantly, the Federal Preemption court, pp 302-303, also rejected the contention reiterated by Plaintiffs here that federal preemption of all economic regulation means that the fees assessed under the MCA to finance that regulation must likewise be preempted, especially since the primary focus of the MCA had traditionally been economic regulation of the trucking industry:

> "Section 601 did not preempt the entire Motor Carrier Act. Section 601 of the FAAAA does not in its words indicate an intent to preempt fee provisions such as those challenged by these appellants. The legislative history reflects a contrary intent. The House Conference Report states that nothing in the legislation is intended to change the application of state tax laws to motor carriers. H R Conf Rep No 677, supra, p 85.
>
> "The PSC still has significant regulatory obligations. For example, the PSC must

> supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for a certificate, MCL 478.1a; MSA 22.560(1), and for administering the act, MCL 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact, because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants ... have not shown that the cost of the PSC's operations has ever been totally funded by the fees its [sic] collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation."

The Court of Appeals has spoken. In two published decisions, Federal Preemption and Michigan Trucking Ass'n, supra, it has ruled that § 601 did not preempt the MCA in its entirety, and least of all in matters of safety regulation and the application and vehicle fees challenged here. That must be this Court's judgment as well. In short, Plaintiffs' motion based on the federal preemption claim must be denied.

SINGLE STATE REGISTRATION SYSTEM

Congress has provided for a Single State Registration System (SSRS) that requires a motor carrier having interstate authority to register annually with only one of the states among those it is authorized to provide transportation service. Under 49 USC 11506, the SSRS is deemed to satisfy the registration requirements of all other states, except for a nominal fee "not to exceed $10 per vehicle" that is permitted annually to each participating state. The same section prohibits as an

unreasonable burden on interstate commerce any other fee not in accordance with that specifically authorized.

Plaintiffs complain that the MCA violates the SSRS by its art IV, § 2(2) requirement of a $100.00 annual fee per vehicle that is registered in Michigan and operated entirely in interstate commerce by a Michigan-licensed motor carrier. Alternatively, they contend that § 2(2) is effectively preempted by the SSRS mandate that no participating state, other than the registering state, exact more than an annual fee of $10.00 per vehicle operated in interstate commerce. In either case, this MCA vehicle fee is supposedly rendered a nullity by the SSRS.

Of course, Michigan's MCA "applies to entities engaged in interstate commerce only to the extent it is consistent with federal law. MCL 476.12; MSA 22.545." Federal Preemption, supra, p 294. Here, however, there is no inconsistency. Section 2(2) of article IV of the MCA applies only to vehicles registered in Michigan by Michigan-licensed motor carriers, i.e., where Michigan is the "registering state." The SSRS fee system places a $10.00 annual vehicle fee limit on only the "participating states," however, not on the "registering state." The SSRS neither prohibits nor preempts the Act's § 2(2) vehicle fee.

Moreover, the MCA expressly accommodates the fee system mandated by the SSRS. In article IV, section 7, MCL 478.7; MSA 22.566, the Act provides for the registration of and fees paid by carriers engaged in interstate transportation pursuant to the SSRS and any other reciprocal multistate agreement. In particular, subsection (4) mandates that "[t]he annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00." Obviously, that is perfectly consistent with the annual $10.00 vehicle fee permitted each participating state by the SSRS. Plaintiffs' motion must therefore be denied.

COMMERCE CLAUSE

The dormant Commerce Clause of US Const, art I, § 8, prohibits a state from erecting barriers to the national regime of free trade by enacting tax or fee requirements that constitute an undue burden on or discrimination against interstate commerce. Plaintiffs assert that the MCA art IV, § 2(1) vehicle fee for intrastate Michigan transportation impermissibly discriminates against interstate motor carriers by favoring domestic carriers whose business is exclusively intrastate. This is supposed to be so essentially because domestic intrastate carriers necessarily derive a disproportionately greater financial advantage for their § 2(1) fees than do those interstate carriers that may want to make an occasional intrastate haul while their vehicles are visiting Michigan. The Court is not persuaded that the choice of whether to engage primarily in interstate rather than exclusively in intrastate transportation, made by private businesses competing in the free marketplace, affects Commerce Clause concerns. And it surely cannot result in the invalidation of § 2(1) on Commerce Clause grounds.

Plaintiffs cite American Trucking Ass'ns v Scheiner, 483 US 266, 282; 107 S Ct 2829; 97 L Ed 2d 226 (1987), for its condemnation of "flat taxes" whose unapportioned measure results in discrimination against some participants in interstate commerce in a manner that contradicts the purpose of the Commerce Clause. As Goldberg v Sweet, 488 US 252, 266; 109 S Ct 582; 102 L Ed 2d 607 (1989), explained, "In Scheiner, we held that Pennsylvania's flat taxes on the operation of all trucks on Pennsylvania highways imposed a disproportionate burden on interstate trucks, as compared with intrastate trucks, because the interstate trucks traveled fewer miles per year on Pennsylvania highways." Here, the MCA intrastate vehicle fee is alleged to be just such a "flat tax" and therefore impermissibe [sic] under the principles enunciated in Scheiner. Plaintiffs' reliance on Scheiner is misplaced.

First, the taxes at issue in that case were exacted for the purpose of financing roadway upkeep based on highway usage, but the flat tax on the privilege of operating on the state roads failed to take into account varying degrees of such usage by the different carriers. Here, however, the fee exacted is regulatory and intended "for administering the act." Federal Preemption, supra, p 302. Such state regulation as remains after federal preemption, including regulation of vehicular size and weight, insurance requirements and safety standards, is not amenable to a fee structure based on apportionment by usage rates. And the fee itself is plainly not a tax on the privilege of doing business in Michigan.[5] Thus, Commerce Clause interests are not affected by the intrastate vehicle fee.

Second, the flat taxes in Scheiner applied across the board to any vehicle traveling the state's highways, whereas the fee here is exacted only of those vehicles, foreign or domestic, that the carrier chooses to operate in point-to-point intrastate Michigan service. The interest furthered by that fee, viz., ensuring that vehicles and carriers operating on Michigan highways in intrastate service comply with MCA safety and fitness norms, is an exercise of state police power and the legitimate expression of the state's concern that the welfare of its citizens be protected. That interest plainly does not have a prejudicial effect on interstate commerce and thus does not impact the Commerce Clause.

Third, Scheiner itself provides ample reason to think its principles are inapplicable to the intrastate vehicle fee of the MCA. There the Court found dispositive its precedents holding "that the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that

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[5] It might also be pointed out that there is a distinction between a tax and a fee, although the Scheiner Court did not adhere to it. Neither did the Court of Appeals in Federal Preemption, supra at 302, quoted above in context, which spoke of the MCA fees as if they were nothing different from "the application of state tax laws to motor carriers." (Emphasis added.)

compete in an interstate market than it imposes on its own residents who also engage in commerce among States." Id, p 282 (footnote deleted). Stated more plainly, this principle applies only where foreign and domestic carriers are all competing in interstate commerce. Thus, Michigan cannot, consistent with the Commerce Clause, tax foreign carriers more heavily than domestic carriers engaged in interstate competition. It can, however, impose the identical vehicle fee of $100.00, as authorized by § 2(1), on all carriers that opt to provide intrastate Michigan transportation services. That fee does not implicate Commerce Clause concerns.

In short, the fee burden here does not fall more heavily on foreign carriers than on Michigan carriers engaged in interstate commerce. It is, rather, the same for all carriers that choose to provide intrastate Michigan haulage services either exclusively or in addition to interstate operations. As was said in Scheiner, p 283, "the Commerce Clause is not offended when state boundaries are economically irrelevant." That is surely true of the § 2(1) intrastate vehicle fee based on Michigan boundaries, which have no economic relevance for interstate traffic. The motion challenging that fee on Commerce Clause grounds must therefore be denied.

The Court determines that Plaintiffs' motions for partial summary disposition are meritless. All three motions must therefore be denied. An order consistent with this option may enter upon its proper presentation.

JAMES R. GIDDINGS
Circuit Judge

DATED: Oct. 13, 1998

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al,

Plaintiffs,

v

File No. 95-15628 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.

_____/

TROY CAB, INC., et al,

Plaintiffs,

v

File No. 94-15631 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.

_____/

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AFFIDAVIT OF THOMAS R. LONERGAN

Thomas R. Lonergan, being first duly sworn, deposes and says as follows:

1. Affiant is the Director of the Motor Carrier Regulation Division of the Public Service Commission, Michigan Department of Commerce, and has held this position for approximately nine years.

MOTOR CARRIER ACT

2. The Motor Carrier Regulation Division (MCRD) is responsible for assisting the Commission in the administration of the Michigan Motor Carrier Act, 1933 PA 254, as amended, MCL 475.1, et seq, the title to which begins as follows:

> "AN ACT to promote safety upon and conserve the use of public highways of the state; …..". (Emphasis added).

3. The titled purpose of promoting safety upon and conserving the use of public highways is restated in the purpose and policy section of the Act, MCL 475.2, which in pertinent part states as follows:

> "It is hereby declared to be the purpose and policy of the Legislature in enacting this law to confer upon the Commission the power and authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to: ... (b) protect and conserve the highways and protect the safety and welfare of the travelling and shipping public in their use of the highways; ...." (emphasis added)

4. The motor carrier transportation industry provides a public service, but also increases the risk of harm to the traveling public and damage to the public highways. The transportation by motor vehicle for hire is a commercial enterprise for profit which utilizes the public highways in conjunction with the travelling public. Since motor vehicles for-hire increase the risk of harm to those using the highways as well as the cost of maintaining those highways, the Motor Carrier Act requires motor carriers to pay their share of the costs associated with promoting safety upon and conserving the

public highways through regulating motor carriers' use of the highways and assessing certain privilege fees and taxes.

5. The title to the Motor Carrier Act provides for the collection of fees and taxes from motor carriers to promote the highway safety and conservation purposes of the Motor Carrier Act as follows:

> "... To provide for the levy and collection of certain privilege fees and taxes for such carriers for such purposes and the disposition of such fees and taxes; ...". (Emphasis added).

6. The Motor Carrier Act, also provides for the regulation of price, route and service of motor carriers for-hire. The title of the act in pertinent part states as follows:

> "... to give the Commission jurisdiction and authority to fix, alter, regulate and determine rates, fares, charges, classifications, and practices of common motor carriers for such purposes; to require filing with the Commission of rates, fares and charges of contract carriers and to authorize the Commission to prescribe minimum rates, fares, and charges, and to require the observance thereof; to prevent unjust discrimination; ..."

7. The regulation relating to price, route and service are also provided for in the purpose and policy section of the act, MCL 475.2 which in pertinent part states as follows:

> "(d) Meet the needs of motor carriers, shippers, or receivers, and consumers; (e) allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow

the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; ... (i) prevent unjust discrimination; ... (k) provide and maintain service to small communities and small shippers; ... (m) promote entrepreneurship in the motor carrier industry by allowing greater contract carrier economic and entry flexibility; ..."

The Motor Carrier Act was also designed to stabilize the industry by limiting entry and regulating rates, routes and services so as to assure quality transportation services to the public, and promote safety upon and conservation of the public highways. Since January 1, 1995 the Motor Carrier Division of the Michigan Public Service Commission has not enforced any of the laws or regulations relating to the price, route or service of a motor carrier.

8. A partial legislative history of Michigan motor carrier regulation includes the following significant events:

a. 1933 Passage of P.A. 254, Michigan Motor Carrier Act

b. 1963 Passage of P.A. 181 Motor Carrier Safety Act, jurisdiction assigned to the Public Service Commission. No funding provided.

c. 1966 PA 162 amends Motor Carrier Act to repeal levy of weight-distance tax on motor carriers, substitutes per vehicle annual fee of $50.00 and application fee of $20.00

d. 1982 PA 354 amends the Motor Carrier Act. Partial deregulation, collective ratemaking authorized, fee increases to improve regulation and

enforcement:

application fee	$20 to $100
annual decal fee	$50 to $100

e. 1982 Executive Order 1982-1 transfers jurisdiction of Motor Carrier Safety Act and the PSC enforcement division to the State Police. Funding continues to be provided from PSC generated motor carrier fees.

f. 1988 PA 347 requires interstate motor carriers to register ICC authority and pay $10 per vehicle fee. To be effective 1/1/90.

g. 1991 Public Law 102-240 "Intermodal Surface Transportation Efficiency Act of 1991" mandates state participation in the "Single State Registration System" to be effective 1/1/94.

h. 1993 PA 352 amends to Motor Carrier Act to further deregulate; requires PSC to develop a safety rating system.

i. 1994 Public Law 103-305 "Federal Aviation Administration Authorization Act of 1994." Sec 601 preempts certain state and local authority for economic regulation of motor carriers.

INTERSTATE VERSUS INTRASTATE COMMERCE

9. Regulation of the motor carrier industry in this nation has traditionally involved a dual system of federal and state regulation. The Interstate Commerce Commission regulates interstate motor carrier transportation while state regulation of intrastate commerce has been preserved. Pursuant to 49 USC § 10521 (**Exhibit A**) the general

jurisdiction of the Interstate Commerce Commission over transportation by motor carriers is defined, and thus leaves the states to regulate intrastate operations involving a pickup and delivery of property in the same state without a prior or subsequent movement through another state.

10. Historically, the Interstate Commerce Commission has regulated motor carriers operating in interstate commerce in a similar fashion to the way the Michigan Public Service Commission has regulated motor carriers operating in intrastate commerce. Certificates of authority to conduct operations, together with tariffs covering rates, routes and services have been provided by the ICC for interstate operations and the MPSC for intrastate operations. The Michigan Motor Carrier Act requires interstate carriers to comply with the Michigan Motor Carrier Act, except to the extent the Act is inconsistent with or contravenes federal law. See MCL 476.12, MCL 477.10 and MCL 478.7. The MPSC regulates the for-hire transportation of property by motor carriers which move wholly within the state (intrastate). If the property to be transported is to be moved by the owner of the property in motor vehicles owned or leased by the owner of the property, then the movement is private carriage, not regulated by the MPSC or the ICC. Otherwise, the for-hire transportation of property intrastate requires a motor carrier to obtain MPSC operating authority.

11. According to the 1993-1994 NARUC compilation of transportation regulatory policy (**Exhibit B**) 45 states and U.S. Territories have some form of regulation of common carriers. The vast majority of these states and territories also regulate insurance (45 states), safety (33 states) as well as the registration of interstate carriers (37 states). Thirty-nine states (39) also assess a fee for intrastate registration of motor carrier operations. Thirty-two (32) states or territories (32) utilize an identification device for vehicles such as a decal or stamp. A few states also regulate private carriers.

MOTOR CARRIER FEE SYSTEM

12. Article 4 of the Michigan Motor Carrier Act, MCL 478.1 through MCL 478.8 provides for the collection of certain fees referred to in the title of the Act to carry out the Act's purposes. Of all the motor carrier fees collected, approximately half go to the Department of State Police for safety enforcement of the motor carrier industry. The remainder is used by the MPSC and the Michigan Department of Commerce for the administration of the Motor Carrier Act which includes enforcement of safety, financial fitness and insurance requirements for motor carriers.

13. The intrastate authority application fee at MCL 478.1 is paid by an applicant for an intrastate MPSC certificate. An interstate motor carrier would not pay this fee. The fee is $100 for the original application and $50.00 for the annual renewal. This fee amount has remained the same since 1982. Prior to the 1982 amendments to the act, the application fee was $20.00 and the renewal fee $10.00. The application process involves several steps including checking the completeness of the application, performing a safety review of the applicant, publishing a notice of the application in the bulletin, and preparing a file for Commission consideration. In the event of a protest, a hearing is also scheduled. Prior to January 1, 1995, oral testimony or written affidavits were also required regarding the public need for the services. The renewal requires a vehicle update and proof of insurance along with payment of fees. The intrastate application fees and renewal fees generate approximately $200,000 per year in revenue which is merged with other motor carrier fee revenues and appropriated to the Public Service Commission, Department of Commerce and Michigan State Police. Any unexpended balances are deposited in the Michigan Transportation Fund at the end of the fiscal year. In fiscal year 1993-94, the PSC collected $224,000 in PSC application fees.

14. A motor carrier obtaining intrastate authority must also determine the vehicles which it will assign to intrastate transportation. A list of the equipment providing intrastate services is furnished with the original application or renewal application. An example of such a listing is attached as **Exhibit E**. A carrier also pays the $100 annual fee relating to his intrastate authority for each vehicle pursuant to MCL 478.2(1). The carrier itself selects which self-propelled power units and how many units, relate to provision of intrastate authority and makes the requisite payment relating to said vehicles. The MPSC Staff does not determine how many units, or which units, are used for intrastate authority. This is a matter solely determined by each carrier a good faith basis, without review by the MPSC Staff. Each carrier makes a determination concerning what portion of their vehicle fleet should be apportioned or allocable to Michigan intrastate authority based upon his own operations, business determinations, and factors which are relevant to his own business circumstances or situation. Neither the MPSC Staff nor the MPSC have undertaken any complaint or other enforcement action relating to second guessing or challenging the vehicle fees paid by a carrier utilizing each carrier's own judgment as to the portion of its fleet to be used for intrastate operations in Michigan based upon its own business circumstances.

15. The intrastate annual vehicle decal fee found at MCL 478.2(1) is paid after an intrastate motor carrier has obtained an MPSC motor carrier certificate. Before the carrier commences operations under its certificate, it must purchase a decal for each power unit at a fee of $100 each. This decal identifies that the carrier has paid its fee and is affixed to the door of the vehicle. A six-month decal is also available after July 1 for $50.00. Each calendar year the decals must be replaced. A household goods carrier only pays a $50.00 annual fee. These fees have remained the same since 1982. Prior to that time the fee was $50.00 except for household goods carriers which paid $20.00. Prior to 1966, the Commission

collected a weight/distance tax rather than a per vehicle fee. This fee, MCL 478.2(1), is the largest source of revenue for the Public Service Commission motor carrier regulation functions and also supports the State Police Motor Carrier Division, which until 1982 was part of the PSC. These fees support State Police enforcement of the Motor Carrier Act, Motor Carrier Safety Act, size and weight limitations, enforcement of the Vehicle Code and other laws governing commercial motor vehicles and motor carriers. In calendar year 1994, the PSC collected approximately $2,905,000 in intrastate vehicle decal fees.

16. The interstate annual vehicle decal fee found at MCL 478.2(2) is paid by an interstate motor carrier only on vehicles registered and plated through the Michigan Secretary of State. The Commission has always interpreted vehicles "registered in this state" as meaning registered and license plated with the Secretary of State. An interstate carrier which registers its vehicles in any other state or province does not pay this fee. The fee is $100.00 per calendar year per vehicle or $50.00 after July 1. A decal identical to the intrastate decal is issued and affixed to the door of the vehicle. This fee has remained the same since 1982. It was $50.00 from 1966 to 1982. These fees amounted to approximately $751,000 in 1994. The revenue from these fees is combined with other motor carrier fee revenue and appropriated by the Legislature for expenditure by the PSC and the State Police Motor Carrier Division. These fees support enforcement of the Motor Carrier Act, Motor Carrier Safety Act, Michigan Vehicle Code, size and weight regulation, and other laws governing commercial vehicles and motor carriers. Since 1966, the fees paid by intrastate PSC regulated motor carriers and interstate motor carriers commercially registered in Michigan have been identical. The fees levied on interstate motor carrier vehicles commercially registered in other states are covered by MCL 478.7 and are a maximum of $10.00. For fiscal year 1993-1994 the Commission collected $2,235,000 pursuant to MCL 478.7(4).

17. The federal single state system of registration, providing for a $10 fee for registering federal authority in each state, is established under the federal sphere of regulation of interstate transportation under the Interstate Commerce Act of 1980 as amended, as the exercise of the federal portion of jurisdiction under the dual nature of state/federal regulation of motor carrier transportation. The separate intrastate fees collected by Michigan and most other states relate to intrastate transportation and the exercise of the states powers relative to the state portion of the dual federal-state jurisdictional system. The intrastate fees collected by the state should not be confused with the single state registration system adopted for the separate federal system.

18. The annual renewal fee collections (478.1) as well as the various annual vehicle fees collections (478.2(1), 478.2(2) and 478.7) for the plaintiffs as well as a sample of large motor carriers that operate in Michigan for the years 1993, 1994 and 1995 are attached as **Exhibit C**. This data demonstrates the diversity of types and amounts of fees paid by the plaintiffs and others. The motor carriers make various business decisions that impact the amount of fees. These decisions involve the location of the principal place of business, the state in which the carrier chooses to register its vehicles and whether or not the carrier has obtained an intrastate certificate.

19. The Legislature expected that motor carriers with a close nexus to Michigan (vehicles operating in intrastate commerce with MPSC authority or vehicles plated in Michigan) would pay fees for the administration of the Motor Carrier Act, the purposes of which are to promote safety, conserve highways and economically regulate the industry. Michigan motor carrier fees under MCL 478.1 and MCL 478.2 are not paid by motor carriers engaged in interstate commerce on vehicles plated in another state. The rationale for charging interstate vehicles plated in Michigan a fee, under MCL 478.2(2), and not charging interstate vehicles plated in another

state is a fee that vehicles which are license plated in Michigan are based in Michigan, and therefore have a greater utilization of the highways and services in Michigan than do vehicles plated in another state. Different states collect various fees and taxes from motor carriers in different combinations and in significantly different amounts. See **Exhibit B** for a chart which shows fuel taxes, truck and trailer registration and other fees (including motor carrier fees such as Michigan's decal fees). Many of these fees apply to both intrastate and interstate motor carriers and motor vehicles.

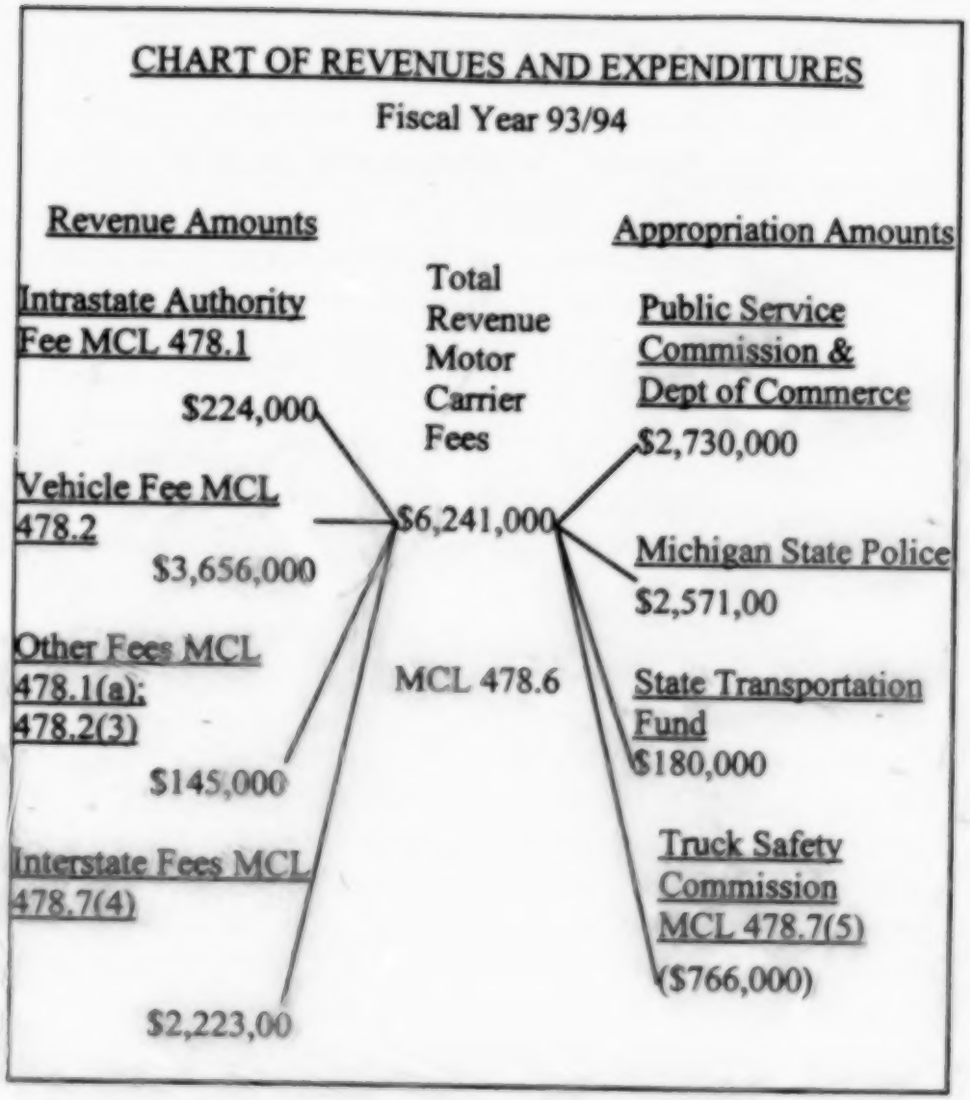
SINGLE STATE REGISTRATION

20. The Single State Registration system, to which the $10 fee applies, relates to filing of interstate ICC authority and proof of insurance with each state for each vehicle operating in interstate commerce to enable states to enforce ICC requirements. It does not relate to the state registration requirements for registration, authorities, license plates, etc. which may be applicable to intrastate operations or those interstate vehicles or operations having a close nexus to the state. The ICC has none of its own police officers or enforcement people to enforce ICC requisite requirements and relies on the states for this purpose under the SSRS system. Congress allows the states to require motor carriers operating with interstate authority to register their ICC certificate or permit before commencing operations within that state and has specifically found that such registration is not an unreasonable burden on transportation when registration is completed under the standards of the single-state-registration system found at 49 USC § 11506. Under the single state registration system, an interstate motor carrier is required to register annually with only one state by filing its ICC certificate or permit and proof of insurance along with the payment of a fee for each participating state not to exceed $10.00 per vehicle which the motor carrier admits will operate in each participating state.

21. Michigan is a participating state in the single state registration system and pursuant to the Michigan Motor Carrier Act, MCL 478.7(4), levies an annual fee of $10.00 or less on each interstate motor carrier vehicle operated in Michigan. In the fiscal year 1993 to 1994 Michigan collected approximately $2,223,000 in interstate registration fees under MCL 478.7(4) and consistent with the requirements of MCL 478.7(5), $766,000 of those fees collected were deposited with the Truck Safety Fund and utilized for safety education programs for motor carriers and Michigan State Police safety and enforcement purposes.

REVENUE COLLECTED FROM MOTOR CARRIER FEES

22. The following chart shows revenue collected and expenses for fiscal year 1993-1994 for motor carrier fee under the Michigan Motor Carrier Act, 1933 PA 254:



As is evident from the above chart, the total amount of regulatory fees collected under the Motor Carrier Act are closely matched to the State of Michigan's cost of regulating motor carriers to carry out the purpose of the Act.

APPROPRIATIONS FOR SAFETY

23. The safety purposes of the Michigan Motor Carrier Act, 1933 PA 254, are carried out in part by the PSC which administers the following safety functions:

a. A MPSC certificate is issued to a motor carrier only after a safety review consistent with requirements set by the Commission in Order T-1281.

b. A certificate may be revoked or suspended for unsafe operations.

c. Regulatory compliance with state and federal vehicle and driver regulations through the certificate process.

d. Regulatory compliance with insurance coverage requirements.

24. Prior to 1982, the Michigan Public Service Commission utilized its own enforcement division to carry out safety inspections, traffic enforcement, safety audits and the operation of scale sites for motor carriers. In 1982, Governor Milliken transferred by Executive Order 1982-1, the PSC Enforcement Division to the Department of State Police along with the responsibility and funding for enforcement of the Motor Carrier Safety Act, 1963 PA 181. Under the Motor Carrier Safety Act, the Motor Carrier Division of the State Police is responsible for the following safety functions:

a. Vehicle requirements such as brakes, load securement, inspections, etc. are specified and enforced.

b. Driver requirements such as hours of service, licensing, medical certificates, etc. are specified and enforced.

c. Drug and alcohol testing requirements are enforced.

d. Safety inspections and audits are conducted.

e. Regulates movement of hazardous materials.

25. Approximately half of all Michigan motor carriers fees collected are appropriated by the Legislature to the Motor Carrier Division of the Department of State Police for safety enforcement and inspections of motor carrier vehicles. Title XII of Public Law 99-570, 49 CFR Federal Motor Carrier Safety Regulations are administered by the Federal Highway Administration of the U.S. Department of Transportation. Through agreements with the State of Michigan, the Motor Carrier Division of the State Police also enforces the federal requirements which in pertinent part include the following:

a. Requires uniform commercial drivers license.

b. Specifies vehicle and driver requirements.

c. Establishes drug and alcohol testing requirements.

d. Specifies accident reporting requirements.

e. Regulates transportation of hazardous materials.

f. Establishes a motor carrier safety rating system.

PREEMPTION OF PRICES, ROUTES AND SERVICE

26. On August 23, 1994, President Clinton signed into law the Federal Aviation Administration Authorization Act of 1994 (FAAA Act), amending Title 49 USC § 11501, which took effect on January 1, 1995.

27. On September 8, 1994, the Michigan Public Service Commission, in direct response to the enactment of 49 USC § 11501(h) issued an "Order and Notice of Hearing Commencing Contested Case Proceedings for An Order Regarding Federal Preemption of State Motor Carrier Regulation", to examine the effect of 49 USC § 11501(h) on the Michigan Motor Carrier Act and Rules. The proceeding was conducted as a contested case pursuant to the Administrative Procedures Act of 1969 and the Commission's Rules of Practice and Procedure.

28. In its January 11, 1995 Opinion and Order the Commission recognized that only the Legislature had the authority to revise the Michigan Motor Carrier Act:

> . . . This order is therefore intended solely to provide guidance regarding how the Commission expects intrastate motor carrier regulation to operate in Michigan after January 1, 1995. Thus, interested parties retain the right to request a different interpretation from the Commission, the Courts, and the Legislature regarding the effect of Section 601 on the issues addressed below.

29. The Commission found in its January 11, 1995 Opinion and Order that section 601(h) of the FAAA Act, 49 USC § 11501(h) specifically provides for the preemption of state economic regulation of motor carriers engaged in the intrastate transportation of property to the extent such regulation is related to a price, route, or service.

30. The Commission found in its January 11, 1995 Opinion and Order that Congress limited the preemptive reach of Section 601 under the heading "Matters not Covered" found at 49 USC § 11501(h)(2). There Congress specifically stated as follows:

> (1) – (a) Shall not restrict the safety regulatory authority of a state with respect to motor vehicles, the authority of the state to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a state to regulate motor carriers with regard to minimal amounts of financial responsibility relating to insurance requirements and self insurance authorization; and (b) does not apply to the transportation of household goods.

31. Pursuant to the Commission's January 11, 1995 Order in MPSC Case T-1273, applications for intrastate authority have been issued for 1995 on a state-wide basis, namely, a motor carrier wishing to perform intrastate service in Michigan makes application for authority for the entire state of Michigan, and pays the requisite application fee. The application then is subject to review for safety, fitness, insurance requirements, and other matters to ensure that the carrier may be authorized to perform services in Michigan. Due to the adoption of Section 601 of the FAAA, effective January 1, 1995, authority is no longer issued relative to any specific rate, route, or service, except for household goods carriers. A copy of the statewide application for intrastate authority is attached as **Exhibit D**. The safety review consists of an analysis of Part II of the Application, Safety Information, as well as any supplemental data that may be requested; U.S.D.O.T. records regarding safety ratings; and Michigan State Police files regarding vehicle inspections, violations found and citations issued. From those materials a safety profile is developed in accordance with the Commission's order in Docket T-1281.

32. Congress also placed beyond the preemptive reach of Section 601, in an optional format, the continuation of certain standard state transportation practices with regard to

uniform cargo liability rules, uniform bills of lading, uniform cargo credit rules and anti-trust immunity for joint line rates or routes, classifications and mileage guides if compliance with state law was no more burdensome than compliance with federal law covering the same subject and if requested by a carrier.

33. In its January 11, 1995 Opinion and Order, the Commission noted that the most important issue to be decided was whether Section 601 preempts the MMCA and rules, either in their entirety or, with respect to only those regulatory provisions concerning price, route and service, and concluded as follows:

> Despite some parties' assertions to the contrary, the wording of [s]ection 601 stops far short of precluding state regulation of all aspects of motor carriage. For example, its heading reads "Preemption of State Economic Regulation of Motor Carriers." This implies that, of the range of areas presently covered by state regulation, economic regulation (rather than regulation of safety, fitness, insurance, etc.) was singled out by Congress for at least partial preemption. Such an implication is further supported by the "General Rule" set forth in [s]ection 601(h)(1), which states only that states "may not enact or enforce a law, regulation, or other provision . . . related to a price, route, or service" of any for-hire or private motor carrier. (Emphasis added.) Issues involving prices, routes, and services have long been considered by the motor carrier industry to fall within the definition of economic regulation.
>
> Furthermore, [s]ection 601 lists several exceptions to Congress' preemption of economic regulation. Foremost among these is the statement that [s]ection 601:

> "[S]hall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." [Section 601(h)(2)(A).]
>
> Next, [s]ection 601 states that its preemptive effect "does not apply to the transportation of household goods." [Section 601(h)(2)(B).] Finally, under the heading "State Standard Transportation Practices," [s]ection 601 indicates that it "shall not affect any authority of a State . . . to enact or enforce" a law, rule, or regulation related to uniform cargo liability rules, uniform bills of lading or receipts for property being transported, uniform cargo credit rules, or antitrust immunity for joint-line rates or routes, classifications, and mileage guides. [Section 601(h)(3)(A).] However, it further provides that continuing regulatory authority over these standard transportation practices (1) will only arise where the law, rule, or regulation "is no more burdensome" than compliance with federal laws covering the same issue and corresponding regulations issued by either the ICC or the U.S. Secretary of Transportation, and (2) will only apply to a carrier "upon request of such carrier." [Section 601(h)(3)(B).] Therefore, the language of [s]ection 601 reflects that its preemptive effect was not intended to be all-encompassing.

The legislative history of [s]ection 601 supports a similar conclusion. According to the Conference Report, its passage was not designed to preempt all state regulation of motor carriage. Rather, it was intended only to "level the playing field between air carriers on the one hand and motor carriers on the other with respect to economic trucking regulation." (Conference Report, p. 82.) [Emphasis added.] Specifically, Congress sought to eliminate the substantial competitive advantage given to air carriers like Federal Express Corporation over traditional motor carriers like UPS as a result of Federal Express Corp v California Public Utilities Comm, 936 F2d 1075 (CA 9, 1991), cert den ___ US ___ (1992). The drafters' intent to achieve this result while limiting the breadth of [s]ection 601's preemptive effect can be discerned from page 85 of the Conference Report, where it is noted that:

> "New subsection (h)(2) emphasizes that State authority to regulate safety, financial fitness and insurance, transportation of household goods, vehicle size and weight and hazardous materials routing of motor carriers is unchanged since State regulation in those areas is not a price, route or service and thus is unaffected." [Emphasis added.]

The Conference Report goes on to disclose that, in return for an agreement by the American Trucking Association (ATA) to withdraw its opposition to the FAA[A] Act, Congress endeavored to structure [s]ection 601 in a way that would "allow regulatory protection to continue for noneconomic factors, such as

liability rules, antitrust immunity to publish documents, insurance, safety, leasing and cargo credit rules." (Conference Report, p. 88.)

Based on [s]ection 601's wording and legislative history, the Commission concludes that it preempts only those provisions of the [MMCA] and the Rules relating to price, route, and service. In reaching this conclusion, the Commission specifically rejects [Appellant] Central's argument that, because the primary focus of the [MMCA] has always been on economic regulation, no basis exists for continuing state regulation of motor carriage. The Commission reaches this conclusion for two reasons. First, [s]ection 601 does not require that, to avoid preemption, safety regulation must be the primary focus of any state statute regulating motor carriage. Second,. . .safety concerns occupy at least co-equal status with the economic regulation found in the [MMCA]. For example: (1) the first clause of this title states that it is "[a]n act to promote safety upon and conserve the use public highways of the state;" (2) MCL 475.2 proclaims, in pertinent part, that "[i]t is hereby declared to be the purpose and policy of the legislature in enacting this law to confer upon the [C]ommission the power to . . . protect the safety and welfare of the traveling and shipping public in their use of the highways;" and (3) MCL 476.5 requires that, to receive a certificate of authority, a prospective motor carrier must show that it is fit--which is defined as being safe, suitable, and financially responsible--and that its vehicles "may be operated safely upon the public highways."

Similarly, the Commission does not find persuasive [Appellant] Central's claim that, by using the phrase "motor vehicles" instead of "motor carriers" in portions of [s]ection 601(h)(2)(A), Congress intended to strip state regulatory commissions of their power to address safety issues and to limit the oversight of these issues to law enforcement agencies. At the federal level, the definition found at 49 USC 10102(13) shows that the phrase "motor carriers" refers only to common and contract motor carriers. In contrast, by reading 49 USC 10102(17) in conjunction with 49 USC 10102(16) and 49 USC 10102(26), it appears that the phrase "motor vehicles" extends to private motor carriers as well. Congress' use of the broader terms thus likely arose from a recognition that several state commissions regulate private carriers, in addition to common and contract carriers, at least with regard to safety. This fact, when coupled with [s]ection 601's legislative history, supports rejection of [Appellant] Central's claim.

For all of these reasons, the Commission finds that [s]ection 601 preempts only those portions of the [MMCA] and the Rules relating to price, route, and service. [Pages 20-24]

34. In its January 11, 1995 Opinion and Order, the Commission found consistent with the Conference Report to Section 601 that the Commission would continue to issue certificates of authority to motor carriers operating in intrastate commerce based upon the carrier's ability to demonstrate compliance with state law regulating safety, financial fitness and insurance.

35. In its January 11, 1995 Opinion and Order the Commission found that neither the language of Section 601 nor the conference report imply that fees imposed by a state's existing regulatory structure might fall within issues related to price, routes or services, and that continued collection of the fees under MCL 478.2 was not preempted. The Commission attached to its January 11, 1995 Opinion and Order, a copy of the Michigan Motor Carrier Act and Rules showing which sections of the act and rules were preempted by drawing a line through the preempted sections.

EFFECT OF PREEMPTION ON MOTOR CARRIER DIVISION

36. The Motor Carrier Division Staff has used the January 11, 1995 Opinion and Order to guide its activities since January 11, 1995. Even prior to the Commission orders in Case No. T-1273, the Staff had taken steps to implement the federal act. New certificate application forms were developed and placed into use as of 11/15/94 which deleted all consideration of routes and services. All rates and tariffs were determined to be invalid as of 1/1/95 and all rate and tariff filings after that date were returned. Applications for certificates of authority continue to be reviewed to determine if the applicant has a satisfactory safety rating or other evidence that the carrier could or would operate safely. Insurance certification continues to be required and continuous coverage monitored. Household goods carriers continue to be regulated as to authority, rates and consumer protection. The 1995 certificate and decal renewal process was performed as required by the statute and the Commission orders in Case No. T-1273. Further, the 1995 Single State Registration Renewal process for interstate motor carriers was continued.

37. The Motor Carrier Division works to promote safety upon the highways and to assure motor carrier fitness and compliance with existing state laws, regulations and orders of the Commission. The Safety and Compliance Section of the

Motor Carrier Division works with the Motor Carrier Division of the Department of State Police to assure safe operations by motor carriers and ensure compliance with applicable laws. The Safety and Compliance Section is required to conduct review of applications for authority as mandated by the Commission's January 11, 1995 order implementing safety rating system, T-1281, which was issued in response to 1993 legislative amendments to the Motor Carrier Act, 1993 PA 352, MCL 479.41-43; MSA 22.587(1)(-)(3), which required the Commission to develop and implement a motor carrier safety rating system by January 1, 1995. Since passage of the FAAA Act and the resulting elimination of complaints about rates or services (except for household goods carriers) the Motor Carrier Division has focused more of its resources on the safety issues required by 1993 PA 254. In 1994, the MPSC Motor Carrier Division had 21 positions. After passage of the FAAA Act in August, new application forms were developed, new procedures put into effect and participation by Staff in the Commission's preemption proceeding was required. The Staff ceased accepting filings related to "rates, routes or services" on or about November 15, 1994 and began to accept applications for authority renewal based only on safety and fitness for operating year 1995.

38. Following preemption, the volume of applications for an original certificate of authority increased dramatically because of the changed entry requirements. The new safety rating system required by 1993 PA 352 and made effective January 1, 1995 required Staff to conduct a safety review of all of the new applicants as well as assuring proper insurance. It was evident that many of these applicants were unfamiliar with legal safety requirements such as drug testing and annual vehicle inspections, some did not even have a commercial drivers license. Thus, a significant education component was required in 1995 and the MPSC Staff worked with the Michigan Trucking Association to provide educational resources.

39. For the fiscal year ending 9/30/95, the Legislature has appropriated 2,162,200 to the Public Service Commission from motor carrier fees collected pursuant to the Motor Carrier Act. Of that amount, 1,584,800 was for the Motor Carrier Regulation Division and the remaining 577,400 for overhead and support operations of the Commission such as financial and personnel services and hearing officers. An additional 566,300 was appropriated to the Department of Commerce for support services such as office rent and data processing services. This appropriations act was signed in July of 1994 and did not anticipate the passage of the federal preemption act.

40. The fiscal year 1995-96 budget for the MPSC and the Department of Commerce reflects significantly less resources funded by motor carrier fees. In fiscal year 1994-95, the total motor carrier fees apportioned to the Public Service Commission and the Department of Commerce was $2,728,500. For fiscal year 1995-96, the aforementioned appropriated amount has been reduced to $1,936,000, a reduction of $791,500.

41. The unavailability of the motor carrier fees to support these appropriations would result in the elimination of approximately 22 positions supporting current in the continuing motor carrier regulation functions. A description of the specific functions of the MPSC Motor Carrier Regulation Division and how they are changed by the Federal Act are as follows:

a. Safety and Compliance: this work unit consists of three staff who perform safety evaluations on applicants for a MPSC certificate. They also handle complaints against motor carriers for safety or insurance problems. Prior to 1/1/95, they also handled complaints related to economic regulation. After

the issuance of the Commission order on 1/11/95, T-1281 regarding the motor carrier safety rating system, the complexity of the safety evaluations significantly increased. The size of this unit has not changed as a result of preemption.

b. Rates and Tariffs: this work unit currently consists of one staff person who handles economic regulation of the household goods industry and water carriers and the few remaining elements of motor carrier rate regulation as provided by the FAAA Act, 49 USC 11501. Prior to 1/1/95, this unit also included an auditor. This position was eliminated due to preemption.

c. Authorities: this work component of the Operations Section consists of three staff persons who process applications for MPSC certificates. This administrative function involves working with applicants on requirements, notices, legal sufficiency of documents and preparation of orders and certificates. Prior to 1/1/95, this work component had four staff, one staff position has been eliminated due to preemption by the FAAA Act.

d. Revenue Collection and Issuance of Credentials: The remaining staff positions of the Operations Section handle the various fee collections, issuance of decals and SSRS receipts and maintain a walk-in over-the-counter service for motor carriers. This function currently utilizes nine staff positions, but

prior to preemption utilized 10 staff positions.

e. Management: The Motor Carrier Regulation Division also has a director and secretary.

REBUTTAL TO TNT HOLLAND'S AFFIDAVIT

44. Affiant has reviewed the intervenor's motion for summary disposition in this case as well as the affidavit of Mr. James C Crozier of TNT Holland Motor Express, Inc.

45. Affiant has a general knowledge of TNT Holland's operations in the State of Michigan based on several years of regulatory oversight. TNT Holland is a major intrastate motor carrier which generated over $11.8 million in strictly intrastate revenue in 1993. TNT Holland is the 5th largest general commodity motor carrier in terms of intrastate revenue and increased its intrastate revenue 27% in 1993 over 1992. TNT Holland operates a network of 7 terminals in the State of Michigan from which it makes daily pickups and deliveries to hundreds if not thousands of customers. It also has contracts with numerous large shippers which involve significant intrastate business. By its own admission it uses in excess of 1,300 trucks or tractors in intrastate commerce.

46. Mr. Crozier takes the position that TNT Holland's intrastate operations are incidental to its interstate operations and therefore the intrastate vehicle fee imposed by 478.2(1) is a burden on interstate commerce rather than intrastate commerce. The scope of operation described above demonstrates the contrary.

47. TNT Holland is a well managed, efficient and profitable motor carrier. Management decides which vehicles are to be used for intrastate operations based on the judgement that they will generate intrastate revenue. Those vehicles not

used in Michigan intrastate commerce are not subject to the $100 vehicle fee.

48. Mr. Crozier states that TNT Holland engages in intrastate commerce in 17 states. Many of those states continue to regulate the intrastate operation of motor carriers and collect a certificate application fee, a renewal fee and an annual vehicle fee just like Michigan does. (See **Exhibit B**).

49. Throughout the arguments of plaintiffs is the underlying premise that the 478.2(1) fee is an "interstate" fee and therefore a burden on interstate commerce. It is an intrastate fee. Interstate motor carriers pay vehicle specific fees pursuant to MCL 478.2(2) or 478.7 of the Motor Carrier Act. TNT Holland pays the intrastate vehicle fee, 478.2(1) for intrastate operations which generate revenues, and utilize state highways and police protection. If plaintiffs' arguments were accepted, any motor carrier with ICC authority could avoid paying state fees or taxes for intrastate operations. 478.2(1) is fair because all vehicles used in intrastate commerce pay the same fee in exchange for police protection and use of state highways.

50. Intervenors argue that a fee which affects interstate commerce must be apportioned or otherwise factored on a mileage basis or exposure criteria. The argument is fallacious. The Single State Registration Program (federally authorized), is based on a flat fee of $10.00 or less per vehicle. The Michigan vehicle registration fee to obtain license plates is based on vehicle weight. The so-called "flat fees" are administratively simple and efficient. The American Trucking Association for years has fought against distance taxes as being too inefficient and difficult to administer.

51. If every state in the Union adopted MCL 478.2(1) there could be no multiplicity of fees because the fees relate only to Michigan intrastate authority.

Further, affiant sayeth not.

Thomas R. Lonergan

Subscribed and sworn to before me

this **14th** day of **September,** **1995**.

Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al,

Plaintiffs,

v

File No. 95-15628 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.
_____/

TROY CAB, INC., et al,

Plaintiffs,

v

File No. 94-15631 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.
_____/

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AFFIDAVIT OF TIMOTHY J. YUNGFER

Captain Timothy J. Yungfer, being first duly sworn, deposes and says as follows:

1. Affiant is a Captain, Commanding Officer of the Motor Carrier Division of the Department of State Police, located at 300 N. Clippert, Lansing, Michigan 48913.

2. The Motor Carrier Division, Department of State Police, is responsible for promoting safety upon the highways through enforcement of state and federal laws relating to commercial vehicles and their use of the highways, including the provisions of the Motor Carrier Act (Act No. 254

of the Public Acts of 1933), the Motor Carrier Safety Act (Act No. 181 of the Public Acts of 1963), the Michigan Vehicle Code (Act No. 300 of the Public Acts of 1949) and the Fire Prevention Act (Act No. 207 of the Public Acts of 1941).

3. The Motor Carrier Division of the Department of State Police employs approximately 165 inspection and enforcement officers and 13 clerical personnel to carry out the various functions and duties of the Motor Carrier Division throughout the State of Michigan.

4. Approximately 40 of the uniformed enforcement officers are assigned to road patrol duties at state police posts throughout the state, and 68 uniformed officers are assigned to individual scale sites.

5. The uniformed officers have full enforcement authority to enforce all of the general laws of the state as they pertain to commercial vehicles.

6. There exists in the Motor Carrier Division four specialized groups which carry out specific functions promoting safety upon the highways through enforcement of laws relating to commercial vehicles and their operations.

7. The first specialized group is the Investigative Section made up of three uniform officers and a supervisory sergeant. The investigative section is responsible for reviewing complaints processed through the Michigan Public Service Commission. The primary focus of the Investigative Section as of May 1995 has been to conduct safety compliance review of motor carriers at their terminals or corporate offices within the state. A safety compliance review may include an on-site inspection of the motor carrier's log books and files to determine if applicable motor carrier safety regulations are being followed. The investigative section is also responsible for on-site safety inspections of the motor carrier's vehicles at the terminal.

8. The second specialized group is the Hazardous Materials Section comprised of 11 uniformed enforcement officers and a sergeant supervisor. This section is responsible the enforcement of safety regulations related to the transportation of hazardous materials.

9. The third specialized group is the Management Audit Section. This section is comprised of three uniformed officers and a supervisory sergeant. The Management Audit Section is primarily responsible for conducting safety audits known as compliance reviews on interstate and intrastate motor carriers utilizing the United States Department of Transportation safety rating system.

10. The fourth specialized section is the Bus Inspection Section, comprised of twelve inspectors and uniformed enforcement officers supervised by a sergeant. This section is responsible for ensuring that all school buses meet safety and equipment standards required by state law.

11. In addition to the four specialized groups, the enforcement officers assigned to road patrol throughout the state conduct safety inspections of commercial vehicles stopped on the highways. Road patrol officers are also responsible for the enforcement of the criminal laws and general regulations pertaining to the operation of commercial vehicles on the highway, including the enforcement of moving violations and size and weight laws.

12. Enforcement officers assigned to scale facilities throughout the state to promote safety upon the highways and protect highway infrastructure by enforcing size and weight laws, conducting driver and vehicle safety inspections of commercial vehicles, and inspecting for proof of registration, operating authority, proof of insurance, and documentation that taxes and fees have been paid.

13. During the 1993/1994 fiscal year, the Motor Carrier Division received and appropriation of approximately $14 million, allocated in the following manner.

a. $2,553,700 from Motor Carrier Fees collected under the provision of the Motor Carrier Act.

b. $944,100 from the Michigan Truck Safety Commission.

c. $5,944,000 from the State Trunkline Fund.

d. $2,553,700 from the federal Motor Carrier Safety Assistance Program. States receiving funds under this program are required to contribute 20% of the funds received for the grant. Motor Carrier Fees are used, in part, as the state match.

e. $749,100 from the state general fund for school bus inspections.

f. $368,900 from hazardous materials inspection fees.

14. The Department of State Police has received funding from the assessment of fees collected under the provision of The Motor Carrier Act (Act No. 254 of the Public Acts of 1933), for the enforcement of the provisions of The Motor Carrier Act and the enforcement of other safety laws and regulations pertaining to the operation of commercial vehicles, since the transfer of the motor carrier enforcement function to the Department of State Police from the Michigan Public Service Commission by Executive Order in 1982.

15. Since the 1991/92 fiscal year, the Motor Carrier Division of the Department of State Police has received and expended Motor Carrier Fees in accordance with the chart identified as attachment "B".

16. The unavailability of the approximate $2.6 million from motor carrier fees and the subsequent reduction in state matching funds for the motor carrier safety assistance program would result in the elimination of 45 uniform enforcement officer positions (not including the reduction in officers to pay for unemployment benefits) assigned to road patrol and weigh station operations. This represents an approximate one-third reduction in resources utilized to promote safety upon and conserve the use of state highways.

17. Since January 1, 1995, the Motor Carrier Division of the Department of State Police has been in compliance with the Federal Aviation Administration Authorization Act which prohibits states from enforcing any laws or regulations related to the price, route or services of a motor carrier.

Further affiant sayeth not.

_____

Captain Timothy J. Yungfer

Subscribed and sworn to before me

this 14th day of September, 1995.

_____

Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

STATE OF MICHIGAN
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SUPPLEMENTAL AFFIDAVIT OF TIMOTHY J. YUNGFER

Timothy J. Yungfer, being first duly sworn, deposes and says as follows:

1. Affiant filed a previous Affidavit signed September 14, 1995, in the above captioned matter which inadvertently omitted that the statements were made on personal knowledge, and that if sworn as a witness, Affiant can testify competently to the facts stated in the Affidavit.

2. Also omitted from my original Affidavit signed September 14, 1995 was Attachment "B" referenced in

paragraph 15 which shows appropriations received and expended by the Motor Carrier Division of the Department of State Police since 1991-1992 fiscal year. Attachment "B" is included with this Supplemental Affidavit.

3. Affiant has reviewed the contents of the Affidavit signed on September 14, 1995, and states affirmatively that the contents of the Affidavit are made on Affiant's personal knowledge, and that if sworn as a witness, Affiant can testify competently to the facts stated in the Affidavit.

Further, Affiant sayeth not.

_____
Timothy J. Yungfer

Subscribed and sworn to before me
this 20th day of September, 1995.

_____
Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

Prepared by Paul Walters 9/19/95

		Prorated Expenses*		
Fiscal Year	Appropriated Motor Carrier Fees	General Enforce-ment	Safety Inspections	Unexpended Motor Carrier Fees
1991/92	2,484,100	2,252.641	149,840	81,619
1992/93	2,484,100	2,323.966	143,234	16,900
1993/94	2,553,700	2,158,607	146,535	250,553
1994/95	2,571,400	2,332,703	144,864	93,833
1995/96	2,664,100			

*Fiscal Year 1994/95 are projected through year end.
Expenses are prorated to percentage of funding from Motor Carrier Fees attributable to the General Enforcement and Safety Inspection Programs

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No. 03-1230

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Michigan Court of Appeals

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents' brief in opposition has virtually nothing to say about the principal issues in this case. Respondents make no effort to defend the central elements of the decision below. They are unable – and in most cases do not even attempt – to distinguish the conflicting decisions by this and other courts. And they offer no reason to doubt that the rule embraced by the Michigan court will lead to the imposition of unacceptable burdens on interstate commerce. Review by this Court accordingly is in order.

A. The Michigan Court's Approach To The Commerce Clause Apportionment Requirement Departs From The Holdings Of This And Other Courts And Will Lead To The Imposition Of Multiple Burdens On Interstate Commerce

1. In the petition, we argued at length that the Michigan court erred in holding that a flat tax on participants in interstate commerce is not subject to the Commerce Clause requirement of fair apportionment so long as the levy is labeled a "regulatory fee." See Pet. 7-17. The State's brief opposing the petition asserts, halfheartedly, that this decision was correct. Br. in Opp. 14-15. But respondents make literally *no* attempt to defend the holding that states may evade the apportionment requirement through the simple expedient of dubbing their levies "regulatory fees." Respondents do not explain how the analysis used below can be reconciled with this Court's decisions; do not try to square that analysis with controlling Commerce Clause principles; and do not deny that the rule of law stated by the Michigan court will lead to the imposition of duplicative burdens on interstate commerce. For this reason alone, the decision below – which also exacerbates a conflict among state courts of last resort

and federal courts of appeals regarding the relevance of the "regulatory fee" label[1] – warrants this Court's review.

2. Rather than defend the rule actually announced and applied by the Michigan court, respondents attempt to justify the malapportionment of the Michigan tax on a variety of grounds that were *not* embraced by the court below. All of these makeweight arguments, however, are insubstantial – and they should not succeed in camouflaging either the significant error of law committed by the Michigan court or the invalidity of the Michigan tax.

a. Respondents' principal contention is that, because the Michigan tax is triggered by the carriage of goods intrastate, the levy should be deemed internally consistent; they reason that, if every state adopted an identical tax, "[e]ach state could charge a fee or tax for intrastate operations and be properly apportioned and internally consistent because the burden is on intrastate commerce and not interstate commerce." Br. in Opp. 18; see *id.* at 17 ("no multiple taxation violating the Commerce Clause would result for the reason

[1] As we explained in the petition (at 17-20), lower courts are in conflict on the question whether state levies should escape the apportionment requirement when they are designated "regulatory fees." Respondents attempt to minimize the conflict by asserting that the states in those cases were "levying a charge to engage in interstate commerce within the boundaries of their states." Br. in Opp. 25. That assertion is wrong as a factual matter; the fees invalidated in the conflicting decisions were imposed on the in-state transportation of hazardous materials, not on "engag[ing] in interstate commerce." See *American Trucking Ass'ns, Inc.* v. *Secretary of State*, 595 A.2d 1014, 1014 (Me. 1991); *American Trucking Ass'ns, Inc.* v. *Secretary of Admin.*, 613 N.E.2d 95, 99 (Mass. 1993). Respondents also miss the more fundamental point: the courts in those cases held that regulatory fees *are* subject to the apportionment requirement (see Pet. 18-19), while the Michigan court in this case held just the opposite.

that each separate state would only be charging for intrastate operations in that same state"). But this argument rests on an obvious fallacy. In fact, the Court has "long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615 (1981) (citing cases). Instead, as we noted in the petition (at 13 n.8), the apportionment and other *Complete Auto* requirements must be satisfied whenever "a 'local activity' * * * substantially affect[s] interstate commerce." *Commonwealth Edison*, 453 U.S. at 616-617. "Even when business activities are purely local, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 573 (1997) (citations and internal quotation marks omitted).

This point is made clear by *Scheiner* itself. There, Pennsylvania imposed an unapportioned tax on carriers "for the privilege of using [the] State's highway system." 483 U.S. at 269. That tax could have been defended on precisely the ground advanced by respondents here: just as no other state may tax intrastate carriage in Michigan, no other state could have imposed a levy on the intrastate use of Pennsylvania's highways. See *id.* at 293-294. But the Court nevertheless held the Pennsylvania tax invalid because unapportioned levies like Pennsylvania's, if imposed by other states on the (assertedly intrastate) use of *their* highways, would result in cumulative burdens on interstate commerce, placing interstate truckers at a potentially crippling competitive disadvantage. See *id.* at 284, 296. Respondents do not, and could not, deny that Michigan's unapportioned tax has exactly the same effect. See Pet. 9-11. And for purposes of Commerce Clause

analysis, it is simply immaterial that this "pinch" on interstate commerce is triggered by an intrastate event.[2]

b. Respondents also appear to argue that a claim of malapportionment cannot succeed because there has been no showing that the business decisions of interstate truckers actually were affected by the flat Michigan tax. Br. in Opp. 7-10. But this Court has made quite clear that no such empirical showing is required. To the contrary, the internal consistency test used to assess the fairness of apportionment "asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a competitive disadvantage as compared with commerce intrastate. A failure of internal consistency shows *as a matter of law* that a State is attempting to take more than its fair share of taxes." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995) (emphasis added).[3]

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[2] For this reason, respondents' attempt to distinguish *Scheiner* on the ground that "Michigan's fees cannot result in multiple fees for interstate transportation" (Br. in Opp. 23) is unavailing. Indeed, as we explained in the petition (at 11-12), the practical impediments to interstate commerce imposed by the Michigan tax are considerably greater than those of the Pennsylvania tax invalidated in *Scheiner*; the Michigan levy effectively punishes interstate truckers who choose to compete with Michigan carriers for in-state business and thus has an obvious protectionist effect. Respondents make no response to this point.

[3] Respondents' reliance on *Jefferson Lines* (at Br. in Opp. 17-19) thus demonstrates their misunderstanding of the apportionment requirement and the internal consistency test. The Oklahoma tax at issue in *Jefferson Lines* was imposed on the sale of bus tickets for travel interstate; the Court upheld the tax because, "[i]f every State were to impose a tax identical to Oklahoma's, that is, a tax on ticket sales within the State for travel originating there," multiple

Thus, as one court recently noted, "[t]he internal consistency test * * * does not look at the actual effect of a tax on interstate commerce but at whether it would, in theory, place interstate commerce at a disadvantage if all states adopted the identical tax"; "the [Supreme] Court has * * * made it clear that it is the inherent tendency of a tax, not the effects that the tax has actually produced, that matters for the 'internal consistency' test." *American Trucking Ass'ns, Inc.* v. *Oregon*, 2004 Ore. App. LEXIS 539, at *12, *21 (Ore. Ct. App. Apr. 29, 2004). See also, *e.g.*, *American Trucking Ass'ns, Inc.* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991); *American Trucking Ass'ns, Inc.* v. *Secretary of Admin.*, 613 N.E.2d 95 (Mass. 1993). Although we made this point in the petition (at 8), respondents offer no response.

Moreover, in upholding claims that state taxes or regulations violate the Commerce Clause's anti-discrimination requirement, the Court has expressly *rejected* the contention that the plaintiff must show an actual adverse effect on interstate commerce. Thus, "[a] particularized showing of the sort respondent[s] seek[] is not required" (*Camps Newfound/Owatonna*, 520 U.S. at 581 n.15), and that is so even if the affected entities "are not deterred by the statute from doing a principally interstate business." *Id.* at 578. See, *e.g.*, *Fulton Corp.* v. *Faulkner*, 516 U.S. 352, 333 & n.3 (1996); *Bacchus Imports, Ltd* v. *Dias*, 468 U.S. 263, 271 (1984). Although we also made this point in the petition (at 21-23), re-

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burdens would not be placed on interstate commerce. 514 U.S. at 185; see *id.* at 186-191. The opposite is true of the Michigan tax. By the same token, the Michigan registration fee on vehicles plated in the State that is mentioned by respondents (Br. in Opp. 17 n.5, citing MCL § 478.2(2)) is not problematic because such registration fees, if imposed by every state on vehicles that it registers, would not adversely affect interstate commerce.

spondents again neither attempt to distinguish the relevant decisions nor make any other response.

c. Finally, respondents are wrong in their contention (at Br. in Opp. 23-24) that fair apportionment of the Michigan tax would be impractical and therefore is unnecessary. As the Court said in rejecting an identical argument in *Scheiner*, "[t]he administrative machinery of revenue collection for highways is now obviously capable of taking into account at least gross variations in the cost per unit of highway usage." 483 U.S. at 297. Michigan is perfectly capable of taking such variations into account when imposing a tax, like the one at issue here, that falls on the annual operation of a truck that travels in the State; indeed, Michigan bases various of its other highway levies, such as vehicle registration fees and fuel taxes, on mileage traveled. See MCL § 257.801g (registration); § 207.101 (fuel). Compare *Scheiner*, 483 U.S. at 297 (Pennsylvania had practical alternatives to flat tax because it apportioned other levies according to "total miles traveled in the State"). In saying this, we do not argue, as respondents would have it, that a tax must "precisely offset the benefits that each person derives from the government." Br. in Opp. 24. But as *Scheiner* explained, a highway levy must be "'based on some fair approximation of use or privilege for use.'" 483 U.S. at 289 (citation omitted). Respondents do not, and could not, claim that unapportioned taxes like Michigan's satisfy that test.

B. The Michigan Tax Discriminates Against Interstate Commerce

As we argued in the petition (at 20-23), the Michigan court also misunderstood the Commerce Clause anti-discrimination requirement. The court held that a constitutional violation could not be made out absent proof that a particular carrier's "economic decision-making" had been affected by the flat tax. Pet. App. 28a. Respondents endorse

that position, contending that the claim of discrimination here should fail because "Petitioners failed to present evidence demonstrating the discriminatory nature of the $100 fee." Br. in Opp. 12. See *id.* at 12-14, 19-20.

As we showed in the petition (at 21-22), however, the Court has held that flat taxes *necessarily* discriminate against interstate commerce: "the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application between those two classes of commerce, generally speaking, impossible." *Nippert* v. *City of Richmond*, 327 U.S. 416, 432 (1946). See *Scheiner*, 483 U.S. at 284 n.16, 291. Respondents make no effort to distinguish *Nippert*, *Scheiner*, or the many other decisions cited in the petition that stand for this proposition – and they do not even attempt to show how the Michigan tax can survive application of this principle. In addition, as we argued in the petition (at 23) and discuss above (at 5-6), the Court has held that, when structural discrimination is present, proof of discriminatory effect is unnecessary to make out a violation of the Commerce Clause. Again, respondents have nothing to say on this point.[4]

Respondents do assert that the Michigan tax does not discriminate against interstate commerce because "[t]he motor carrier chooses where it will conduct business" and makes its own "selection of those vehicles it designates as being util-

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[4] Respondents may mean to argue that Michigan law requires "proof of specific facts" establishing discrimination and that the absence of such evidence provides an independent state ground for the decision below. Br. in Opp. 9-10. If this is respondents' contention, it is wholly without merit. Needless to say, a state court may not rely on a state-law ground for decision that is itself inconsistent with the federal Constitution. In fact, the relevant part of the decision below turned exclusively on the Michigan court's reading of the Commerce Clause. See Pet. App. 28a-32a.

ized for intrastate transportation." Br. in Opp. 20. It is the very purpose of the Commerce Clause, however, to ensure that states do not impose special burdens on companies that choose to conduct business across state lines. And respondents are wrong if they mean to contend that carriers may escape the burdens of the flat Michigan tax by dedicating certain of their trucks exclusively to intrastate commerce. Such a course is not possible as a practical matter (see Pet. 12 n.7) – and even if it were, a state may not "force a taxpayer" to restructure its operations or conduct a higher percentage of its business in-state "in order to avoid discriminatory taxation." *Kraft General Foods, Inc.* v. *Iowa Dept. of Rev. & Fin.*, 505 U.S. 71, 78 (1992). See Pet. 12 n.7 (citing cases).

C. The Issues Presented Here Are Important Ones That Should Be Reviewed By This Court

Given the distracting goulash of arguments advanced by respondents, it is important not to lose sight of the central issues actually presented by this case. The Michigan court's holding that regulatory fees are not subject to the apportionment requirement carves a large loophole in an essential Commerce Clause protection. As we showed in the petition (at 24-26), the rule stated by the court below is applicable to a wide range of legislation in many states, arises with considerable frequency, exacerbates a conflict in the lower courts, and places state officials in doubt about their taxing authority. By the same token, the Michigan court's holding that the anti-discrimination principle comes into play only when there is quantifiable proof of an adverse impact on interstate commerce injects considerable confusion into Commerce Clause litigation and often will make it impossible to challenge state levies that burden interstate businesses. Because these issues are recurring ones of considerable practical importance (a point confirmed by the broad *amicus* support for the petition)[5] – and because the rules now governing taxation in Michigan cannot be squared with federal constitutional requirements – review by this Court is in order.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari to the Michigan Court of Appeals should be granted.

Respectfully submitted.

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[5] Respondents also are wrong in asserting that there is no evidence in the record regarding the amount at stake in this litigation. An affidavit appended to respondents' brief in opposition itself indicates that almost $3 million was collected under the Michigan tax in 1994 alone. Br. in Op. 23b, ¶ 15. Because ten years of tax receipts are now at issue in this suit, it is apparent that at least $30 million (plus many years' interest) is at stake.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to this Court's Rule 15.8, petitioners submit this supplemental brief calling the Court's attention to a recent decision of the New Jersey Supreme Court that is relevant to the pending petition for certiorari in this case. The recent decision, *American Trucking Ass'ns, Inc. v. State of New Jersey*, 852 A.2d 142, 2004 N.J. LEXIS 910 (July 19, 2004), which is appended to this brief, expressly confirms that the issue presented here is a significant one on which the state courts of last resort and federal courts of appeals are badly divided. That decision also provides strong support for the conclusion that the holding below in this case is incorrect.

In its recent decision – which involved a constitutional challenge, brought by one of the petitioners in this case, that is identical to the one raised in the petition for certiorari – the New Jersey Supreme Court held that New Jersey's annual fee on transporters of hazardous waste violates the U.S. Constitution's Commerce Clause. In all relevant respects, the tax invalidated by the New Jersey court is indistinguishable from the one at issue in the Michigan case pending before this Court. Both are flat annual levies imposed on each vehicle that is registered to engage in specified activity in the state. See App., *infra*, 5a-7a. Just as the Michigan tax applies only to carriers that engage in intrastate trips, the New Jersey "transporter registration fees must be paid only by transporters who collect or deliver hazardous waste in New Jersey. Those who merely travel across the State are not subject to the requirement." *Id.* at 5a. And as did the State of Michigan in its case, New Jersey defended its levy on the ground "that the transporter fee mechanism is not a tax and should be evaluated under the standard governing user fees." *Id.* at 26a. *See id.* at 31a (noting New Jersey's argument that its levy should be upheld because it is "a 'regulatory user fee'").

But that is where the similarities end. As we explain in the petition, the Michigan Court of Appeals accepted Michigan's argument, holding that the four-part Commerce Clause test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), has no application to "regulatory" fees. See Pet. 5-6. The New Jersey Supreme Court, in contrast, took the opposite tack, "reject[ing] the State's contention that as long as a 'flat fee' is a 'regulatory user fee,' it is not subject to the four-prong test of *Complete Auto Transit*." App., *infra*, 36a. In reaching this conclusion, the New Jersey court reasoned that "[i]t is 'the practical effect of [the] challenged tax' that is determinative" (*id.* at 26a (citation omitted)) and that "the label used by the State for the exactions assessed has no effect on the result." *Id.* at 29a.

Against this background, the New Jersey court explained that "[t]he critical feature" that can save a levy from unconstitutionality under the Commerce Clause apportionment requirement "is that it is apportioned in some way demonstrably related to the use or privilege to use the service or facility for the maintenance of which the fee is imposed." App., *infra*, 32a. And the unapportioned New Jersey transporter fee fails this test, the court continued, because it is not "related to the pay[e]rs' levels of use of the facilities or services the fees were enacted to sustain." This means that the New Jersey "fees fail the internal consistency test; they discriminate against interstate commerce; and they impose an undue burden on interstate commerce. The transporter fees threaten 'the free movement of commerce by placing a financial barrier' around the State of New Jersey." *Id.* at 37a (citation omitted). The court held this to be so even though the New Jersey fees were "used exclusively to fund a regulatory safety and inspection program" (*id.* at 29a) and "the revenue collected is devoted to services that benefit only the group paying the fee." *Id.* at 32a. This conclusion is flatly inconsistent with the result in the Michigan case that is challenged in the pending petition.

The New Jersey Supreme Court also departed from the reasoning of the Michigan Court of Appeals in a related respect. The Michigan court held that the flat Michigan tax could not be regarded as discriminatory because there was no empirical evidence that the levy actually succeeded in discouraging interstate commerce. See Pet. 6-7, 20-21. The New Jersey court, in contrast, recognized that flat taxes are "*structurally* discriminatory, and [interstate carriers] should not be compelled to prove the precise level of the per-activity cost disparity." App., *infra*, 35a-36a (emphasis added). As the court explained, "[e]ven though the fees at issue may be targeted appropriately, *i.e.*, they are imposed on 'delivery or collection[,]' not merely on transport of hazardous waste through the State, the fact remains that, among businesses similarly engaged, out-of-state truckers will pay a distinctly higher cost per activity on average than in-state truckers will pay." *Id.* at 38a. This conclusion also cannot be reconciled with the decision in the Michigan case under review.

In addition to pointing up the error in the Michigan decision, the New Jersey Supreme Court's holding recognizes the growing conflict in the lower courts on the important constitutional question whether state levies denominated "regulatory fees" are subject to the usual Commerce Clause rules. The New Jersey court noted that the Washington Supreme Court and the U.S. Court of Appeals for the Tenth Circuit have exempted such fees from the *Complete Auto Transit* requirements. App., *infra*, 32a-35a (citing *Franks & Son, Inc.* v. *Washington*, 966 P.2d 1232 (Wash. 1998), cert. denied, 526 U.S. 1066 (1999), and *V-1 Oil Co.* v. *Utah State Dept. of Public Safety*, 131 F.3d 1415 (10th Cir. 1997)). But "based upon a fair reading of *Scheiner* and a straightforward application of the principles informing it," the New Jersey Supreme Court expressly "disagreed with the rationales employed" by

those courts. *Id.* at 35a. Instead, the New Jersey court embraced the contrary reasoning of the highest courts in Maine and Massachusetts and the Wisconsin Court of Appeals. *Id.* at 31a (citing *American Trucking Ass'ns, Inc.* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991); *American Trucking Ass'ns, Inc.* v. *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993), and *American Trucking Ass'ns, Inc.* v. *State of Wisconsin*, 556 N.W.2d 761 (Wis. Ct. App.), rev. denied, 560 N.W.2d 724 (Wis. 1996)). Each of those courts "analyzed flat transporter fees not dissimilar from those involved here under the *Scheiner* standard for unapportioned taxes" and "held the flat fees to be structurally unsound * * * because they failed the internal consistency test. Those courts did not require the complaining party to submit specific proofs of actual discrimination." *Ibid.* This conflict in approach inevitably will prompt continued interference with interstate commerce, while causing great confusion for state taxing authorities and motor carriers.

For the foregoing reasons and those stated in the petition and reply brief, the petition for a writ of certiorari to the Michigan Court of Appeals should be granted.

Respectfully submitted.

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AUGUST 2004

APPENDIX

AMERICAN TRUCKING ASSOCIATIONS, INC.,
A Non-Profit Corporation, Incorporated Under
the Laws of the District of Columbia and
SUTTLES TRUCK LEASING, INC.,
An Alabama Corporation, on behalf of themselves
and others similarly situated,
Plaintiff-Appellants and Cross-Respondents,

v.

STATE OF NEW JERSEY,
Defendant-Respondent and Cross-Appellant.

A-15/16 September Term 2003

SUPREME COURT OF NEW JERSEY

852 A.2d 142; 2004 N.J. LEXIS 910

February 2, 2000, Argued
July 19, 2004, Decided

OPINION

JUDGE KESTIN (temporarily assigned) delivered the opinion of the Court.

The issue before us in this appeal is whether this State's annual hazardous waste transporter registration fees (transporter fees) as assessed against out-of-state transporters can withstand federal Commerce Clause scrutiny. We hold, on the record developed herein, that they cannot.

I.

This matter comes before us with a protracted procedural history. The case began with a class-action complaint filed in the Tax Court in October 1992. Plaintiffs, on federal Commerce Clause grounds, U.S. Const. art. I, § 8, cl. 3, challenged the validity of the hazardous waste transporter registration fee regulation promulgated in N.J.A.C. 7:26G-

3.3(g) pursuant to N.J.S.A. 13:1E-18, a provision of New Jersey's Solid Waste Management legislation, N.J.S.A. 13:1E-1 to -223.

The State moved to transfer the matter to the Appellate Division. See R. 2:2-3(a)(2). In an order entered on January 3, 1994, the Tax Court denied the motion, and the Appellate Division denied the State's motion for leave to appeal. On August 3, 1994, the Tax Court denied the parties' cross-motions for summary judgment and, on October 14, 1994, certified the class.

In 1997, the parties, once again, each moved for summary judgment. The Tax Court, on March 23, 1998, granted partial summary judgment to plaintiffs, and denied the State's motion. In an oral opinion, Judge Dougherty ruled, based on the showings before her at the time, that the fees, as authorized by statute and implemented by regulation, "discriminate against interstate commerce and unduly burden interstate commerce." The State was "permanently enjoined from the further collection of the transporter fees."

The State moved before the Appellate Division for leave to appeal and a stay pending appeal; and it moved before the Tax Court for a stay of its decision, for a stay of proceedings on plaintiffs' claims for a refund and an award of counsel fees, and for an order certifying the March 23, 1998 order as a final judgment pursuant to Rule 4:42-2. The Tax Court denied the latter motions, and the Appellate Division denied the motions for leave to appeal and a stay. On June 30, 1998, however, in an order reported at 154 N.J. 604, 713 A.2d 497, we granted leave to appeal and summarily remanded the matter to the Appellate Division for consideration on the merits. Shortly thereafter, the Appellate Division stayed further proceedings in the Tax Court pending resolution of the appeal, but denied the State's renewed motion for a stay of operation of the Tax Court decision.

On full consideration, in an opinion reported at 324 N.J. Super. 1, 734 A.2d 314 (1999), the Appellate Division reversed the Tax Court's grant of partial summary judgment and directed the State to apply, on notice to plaintiffs, for a "fairness" ruling from the United States Department of Transportation (USDOT) pursuant to 49 U.S.C.A. § 5125(g). *Id.* at 18. The Appellate Division concluded, in the context of every state's authority to evaluate the interstate commerce impact of its hazardous waste hauling fees,

> that a final judgment, and particularly summary judgment, should not issue in this State absent critical input from the United States Department of Transportation (USDOT), which has been charged by Congress with administration of the Hazardous Materials Transportation Act (HMTA), 49 U.S.C.A. § 5101 to 5127, to promote uniformity and to ensure fairness of hazardous waste hauling fees imposed by the respective states.
>
> [*Id.* at 4.]

The Appellate Division remanded the matter to the Tax Court to "retain jurisdiction pending compliance with the directions[.]" *Id.* at 18. The panel observed, "in light of the reversal and remand, and [its] prior ruling on the State's stay application, . . . that the Tax Court decision is no longer in effect. Fees hereafter collected shall be subject to refund, depending upon the outcome of further proceedings." *Ibid.*

In orders reported at 162 N.J. 124, 741 A.2d 93 (1999), we granted both parties' motions for leave to appeal. The requirement for reference to USDOT for a fairness ruling is challenged by plaintiffs and defendants. Both sides seek a ruling on the merits of the constitutional issues.

In an order reported at 164 N.J. 183, 752 A.2d 1286 (2000), we noted the existence of "controverted issues of fact concerning the actual impact of the fee on interstate carriers of hazardous materials[,]" and the need for "a well-developed

record" before deciding the ultimate constitutional issues, including "the proper role of the [USDOT.]" *Ibid.* We, therefore, "summarily remanded to the Tax Court for a plenary hearing on the allegedly discriminatory economic impact of the . . . fees," retaining jurisdiction. *Id.* at 184. Justices Long and Verniero dissented from that disposition, expressing the view that the Appellate Division's decision should be affirmed on the basis of Judge Landau's opinion because, while questions pended that were within the jurisdictional competence of USDOT, established principles of judicial restraint militated against addressing the constitutional issues. *Id.* at 184-86 (Long, J., dissenting).

On our remand, the matter was heard by Presiding Judge Small in the Tax Court. On full consideration of the evidentiary record developed, he found "the State had failed to prove that the fee does not discriminate." Applying a "presumption that a flat truck fee is violative of the Commerce Clause," he determined, based upon the facts as he found them, that the challenged fee is not valid.

II.

The statute, N.J.S.A. 13:1E-18, provides in pertinent part:

> a. The [State Department of Environmental Protection] may in accordance with a fee schedule adopted as a rule or regulation establish and charge annual or periodic fees for any of the services to be performed in connection with the "Solid Waste Management Act," P.L. 1970, c. 39 (C. 13:1E-1 et seq.), except that the annual or periodic fees charged by the department to cover the costs incurred by any State agency relevant to pre-licensing investigations, post-licensing compliance monitoring or related activities under the provisions of P.L.1983, c. 392 (C. 13:1E-126 et seq.) shall be based upon the size of the business concern. For the purposes of this subsection, "business concern" means any corporation, association, firm, partnership, sole proprietorship, trust or other form of commercial or-

> ganization; "size" means the number of key employees or persons required to be listed in the disclosure statement, or otherwise shown to have a beneficial interest in the business of the applicant, permittee or licensee as defined in section 2 of P.L.1983, c. 392 (C. 13:1E-127); and "State agency" means any State department, division, agency, commission or authority.
>
> * * *
>
> b. The fee schedule shall reasonably reflect the duration or complexity of the specific service rendered, permit application reviewed, or registration statement or engineering design application approval sought.

The transporter registration fees must be paid only by transporters who collect or deliver hazardous waste in New Jersey. Those who merely travel across the State are not subject to the requirement.

The registration process requires transporters to provide the State Department of Environmental Protection (DEP) with the vehicle's license plate, the vehicle identification number assigned by the Division of Motor Vehicles, ownership and insurance information, and payment of the fee. The DEP then issues a decal for each cab, trailer or container bearing a unique identification number. The decal number allows the DEP to track the owners of an individual transporter unit. New Jersey law prohibits treatment, storage and disposal facilities from accepting waste from a transporter unless it has a decal affixed.

Judge Landau's precis of N.J.A.C. 7:26G-3.3(g), the challenged regulation, as it stood before the Appellate Division in 1999 was:

> At the time the complaint was filed, the hazardous waste transporter fees were codified at then N.J.A.C. 7:26-4A.3(g)(1). Effective October 21, 1996, the transporter fees were recodified at N.J.A.C. 7:26G-3.3(g). 28 N.J.R.

1693(a); 28 N.J.R. 4606(a). The rates were modified slightly, lowering the annual amounts due, but retaining the same structure:

(g) The fee schedule for hazardous waste transporters is as follows:

1. All hazardous waste transporters shall pay an annual registration fee. A State of New Jersey hazardous waste transporter registration decal will be issued for each hazardous waste cab and transport unit (as defined at N.J.A.C. 7:26G-4.2) for which a fee is paid. The fee registration year shall extend from October 1 through the following September 30. The fee shall accompany the submission of the annual registration application. All vehicles registered with the Department must be owned or leased by the applicant. If the vehicle is leased, a copy of the lease must be submitted with the registration application. The registration of a hazardous waste transporter is nontransferable and fees are not refundable. The annual registration fees are as follows:

i. Each hazardous waste cab: $21.00;

ii. Each hazardous waste transport unit, either detachable or with a permanently attached hazardous waste cab, having a capacity less than or equal to one ton (one ton = one cubic yard = 200 gallons): $85.00;

iii. Each hazardous waste transport unit without a hazardous waste trailer having a capacity greater than one ton (one ton = one cubic yard = 200 gallons): $191.00; and

iv. Each hazardous waste transport cab with permanently attached hazardous waste transport unit with a capacity greater than one ton (one ton = one cubic yard = 200 gallons): $212.00

[324 N.J. Super. at 6.]

Judge Small, in his opinion, also noted that the flat fees per vehicle had been somewhat higher before 1996. The regulation, as currently promulgated, has a biennial structure with rates that are, marginally, even lower on an annual basis.[1]

Judge Small stated:

> As a consequence of this litigation no fees have been collected from the plaintiff class since 1998. The [DEP] has indicated its intention to collect those fees if and when it prevails in the litigation.
>
> The DEP imposes other fees and regulations on transporters of hazardous waste. Under the A-901 program, individuals and corporations wishing to be licensed to transport hazardous waste in New Jersey must undergo extensive background checks at the substantial cost of $900. N.J.S.A. 13:1E-126 to -207. Under the hazardous waste transporter fee statute once the companies and individuals are licensed and their equipment is licensed and registered each pick-up or drop-off of hazardous waste in New Jersey must be documented by a multipart manifest. The fee for each manifest is $9 and is paid by the generators of hazardous waste. Neither the A-901 fee nor the manifest fees are challenged in this case, only the annual per vehicle registration fee is challenged.

With the completion of the remand proceedings mandated in our order of June 20, 2000, 164 N.J. 183, 752 A.2d 1286, both the resulting Tax Court ruling of March 14, 2003, and the Appellate Division decision of June 15, 1999, on appeal from the earlier Tax Court order granting partial summary judgment to plaintiffs, 324 N.J. Super. 1, 734 A.2d 314, are now before us for review. Our order of June 20, 2000, summarily remanding "for a plenary hearing on the allegedly

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[1] The biennial structure and modified rates were proposed on November 19, 2001, 33 N.J.R. 3853-54, and adopted on May 6, 2002, 34 N.J.R. 1712-13.

discriminatory economic impact of the hazardous waste transporter fees[,]" 164 N.J. at 184, was based on the need for "a well-developed record" in this "especially fact-sensitive" matter, to "better enable [us] to determine the proper role of the United States Department of Transportation under the provisions of the Hazardous Materials Transportation Uniform Safety Act of 1990, now codified in 49 U.S.C.A. § 5101 to 5127[.]"[2] *Id.* at 183. Jurisdiction was otherwise retained. *Id.* at 184. Thus, we are now called upon to evaluate the matter in the light of Judge Landau's opinion and the record upon which it was based, as well as Judge Small's findings and conclusions.

III.

The showings of the parties in the initial Tax Court proceeding and the trial court's treatment of those showings were summarized in the Appellate Division opinion, 324 N.J. Super. at 6-9. Additional proofs were presented in the remand proceeding.

Plaintiff's experts had conducted several analyses to quantify the impact of the transporter fees on interstate commerce by comparing the cost per activity between intrastate and interstate transporter companies. Some data limitations impaired the attempts of both parties to analyze the impact of the fees on interstate commerce. For example, plaintiffs' data had been compiled at the company level and not on a per-vehicle basis; and, the State had no reliable data for periods before 1993.

In most of their analyses, plaintiffs characterized "New Jersey transporters" (NJ) as having eighty percent or more of their truck fleet bases registered in New Jersey, and "non-New Jersey transporters" (NNJ) as having eighty percent or

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[2] In 1994, the title of the legislation was changed to the "Hazardous Materials Transportation Act." Those amendments are embodied in the codification at 49 U.S.C.A. § 5101 to § 5127.

more of their fleets registered outside of New Jersey.[3] Plaintiffs' experts conducted several comparisons of fees per level of activity: 1) fees per manifest; 2) fees per ton of hazardous waste hauled using the 80% definitions and excluding one out-of-state company, Safety Kleen, that had a very large New Jersey presence; 3) fees per ton of hazardous waste hauled using the State's definition of NJ and NNJ companies and excluding Safety Kleen; and 4) fees per ton of hazardous waste hauled using the proffered definitions of NJ and NNJ companies, and including all companies. The same experts offered costs-per-activity analyses in several forms. According to their statistics, irrespective of which methodology was used, NNJ companies paid more per manifest and more per ton of hazardous waste hauled than NJ transporters for all the years analyzed. The most conservative estimates, including Safety Kleen in the NNJ data, indicated that NNJ transporters paid between 1.9 and 2.6 times more per ton hauled than NJ transporters.

The State argued that the more appropriate way to distinguish between NJ and NNJ transporters is to use identification numbers assigned by the United States Environmental Protection Agency. The State's expert conducted an analysis accordingly, comparing the market shares in annual ton hauled of NNJ and NJ haulers between 1993 and 2000. The results showed that between 1993 and 2000, the market share of NNJ companies increased from 54% to 59% for small companies (those with less than 1% of all waste transported in any given year), and also increased from 45% to 48% among the large companies (those with more than 1% market share).

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[3] We discern that those ranges resulted in omissions from the analyses of data relating to a potentially significant number of transporters in each category, i.e., those whose fleets were in the twenty percent to eighty percent ranges.

IV.

The essential questions of law in the matter revolve about whether the fees at issue discriminate against interstate commerce or unduly burden interstate commerce. Judge Small reported in his opinion:

> The parties set about proving and disproving the existence of discrimination under the Commerce Clause of the United States Constitution . . . in two fundamentally different ways. The plaintiffs, a class of interstate truckers with tractors and trailers base registered outside of New Jersey presented expert testimony which showed that the cost (or tax) per manifest of hazardous waste shipped (a surrogate for the total number of shipments) and the cost (or tax) per ton of hazardous waste shipped (a surrogate for the level of hazardous waste handling activity) attributed to the hazardous waste transporter fees for out-of-state companies was a multiple of the cost per manifest and cost per ton of comparable New Jersey companies. The defendant demonstrated that between 1993 and 2001 the number of out-of-state waste haulers operating in New Jersey did not decline in absolute numbers nor did the out-of-state haulers' relative share of the market vis-a-vis New Jersey haulers decline. The defendant's expert opined that if the fee did discriminate as a matter of fact those numbers should have declined. Since they didn't he concluded that the fee did not discriminate against out-of-state haulers.

Judge Small found the evidence on both sides deficient:

> Despite the long history of this case, the large record, and the skilled and sustained advocacy of counsel, after careful review of the evidence, I find that much of the evidence is not relevant, as a matter of law. I further find the evidence is inconclusive as to whether the challenged fees do or do not discriminate against the plaintiff class (in large part because the data did not permit analysis

> comparing members of the class to non-members and the methods used to define surrogate groups to represent the class are unreliable).

Specifically with respect to plaintiffs' showings, Judge Small found their analysis to be

> flawed (1) by a lack of data which would have linked the fees imposed to specific vehicles rather than the available data linking fees to individual companies, (2) by an analysis based on number of trips as opposed to tonnage hauled, and (3) by its arbitrary definition of out-of-state vs. in-state truckers (those with 80% or more of its vehicles base registered outside of New Jersey and those with 80% or more of its vehicles base registered in New Jersey – excluding from the analysis those with vehicles base registered in or out of New Jersey at lower percentages.)

And, he concluded that the State's

> form of analysis chosen was incapable of segregating the impact of the hazardous waste transporter fee on the behavior of hazardous waste transporters from the impact of every other factor that may have motivated that behavior. Additionally, the failure to look at behavior before and after the fees were imposed but only during a period commencing four years after the fee was imposed has no basis in logic or scientific method as supporting any conclusion about the impact of the fee.

In analyzing the proofs presented, Judge Small posited, as a beginning point, the rule of *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987), that flat taxes or fees, i.e., impositions not related to activity, are unconstitutional. He observed:

> Although [plaintiffs'] method was more revealing than that chosen by the State to measure discrimination as a matter of logic or law, it too failed to convince me that the transporter fee is or is not as a matter of fact discrimi-

natory. Based on the evidence before me, I can make no conclusion about the discriminatory or non-discriminatory impact of the hazardous waste transporter fee on New Jersey and non-New Jersey hazardous waste transporters. As a matter of law the fee, a flat fee, not shown to be non-discriminatory is in violation of the Commerce Clause of the United States Constitution even though the parties have agreed that the total amount collected does not exceed the costs of administering the program. Absent proof to the contrary, there is a legal presumption dating to [*Scheiner*] that a flat truck registration fee, not based on activity is presumed to be discriminatory against interstate as opposed to intrastate activity.

* * * *

In [*Scheiner*], the Supreme Court of the United States found that a flat tax imposed by Pennsylvania on both interstate and intrastate motor carriers on the basis of the number of axles of the truck was per se unconstitutional. The plaintiffs assert that under [*Scheiner*] and subsequent interpretations by lower courts, the New Jersey hazardous waste transporter fees must fail. The State argues under a line of cases starting with *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines*, 405 U.S. 707, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972), that the New Jersey hazardous waste transporter fee is a user fee not violative of the Commerce Clause. There is a fundamental difference between the fees imposed and found unconstitutional in [*Scheiner*] and those approved in [*Evansville*]. The fees in [*Scheiner*] were an annual per vehicle fee – just like the fees at issue in this case. In [*Evansville*,] the airport fee (a head tax) was based on activity, the enplaning of individual passengers, similar to the New Jersey $9 per manifest fee not challenged in this case.

In a prior bench opinion, another judge of this court held that the fee in question was violative of the Commerce Clause because it failed the internal consistency test. Thus, if each state imposed the tax, those engaged in interstate commerce would pay multiple fees and those engaged in commerce in one state would pay a single fee. Fees which satisfy the internal consistency test are fees paid in one state, which are credited against other states' fees or are paid in lieu of other states fees (i.e., automobiles need be registered in only one state, to travel in all states). *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). In this case, the Appellate Division held that such a ruling on the constitutionality of the tax was unnecessary in that Congress had enacted, under its commerce power authority, 49 U.S.C.A. § 5125(g), the Hazardous Materials Transportation Unfair Safety Act of 1990 which included a requirement that statutes like the New Jersey hazardous waste transporter fee be "fair." Thus Judge Landau opined that, having entered the field, Congress had preempted the standards by which the New Jersey's statutes would be measured against the Commerce Clause and established a standard of "fairness." The Court reasoned that, in order to foster uniformity, "fairness" should be decided by the United States Department of Transportation. See *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992)(discussing the Commerce Clause and Congress's power to regulate commerce between the states).

Noting that the State had asserted " 'the fee only covers the administrative cost of the program' " and that "the parties [had] stipulated for the purpose of this litigation that the costs of regulating the hazardous waste industry in New Jersey is equal to or greater than the fee collected[,]" Judge Small observed: "the issue remains as to whether that fee is constitutionally and fairly apportioned between in-state and out-of-state carriers."

Therefore, in this proceeding before me the State went first. Flawed as the plaintiff's evidence may be, since the United States Supreme Court's decision in [*Scheiner*], courts have consistently held that flat taxes (taxes not related to activity) like the ones in this matter are unconstitutional. *American Trucking Ass'ns* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991), *American Trucking Ass'ns* v. *State*, 205 Wis. 2d 494, 556 N.W.2d 761 (WiS. Ct. App.)[, review denied, 207 Wis. 2d 285, 560 N.W.2d 274] (1996). The state's assertion that the consequence of New Jersey's tax is that no foreign based carriers have withdrawn from New Jersey as a result of this tax is flawed, in that the start date is four years after the imposition of the tax, and irrelevant as a matter of law.

Judge Small commented further on the parties' proofs, beginning with the State's evidence:

The State's position is that the fee is a minor part of a hauler's costs; it represents approximately 3% of the hauler's gross revenue. Such a small factor cannot influence behavior; and if it does not influence behavior (i.e., deter out-of-state haulers from entering the New Jersey market), it cannot discriminate. This position is at odds with the legal test for discrimination The issue is not whether the fee influences interstate haulers' behavior. The fee discriminates if it imposes a cost on out-of-state haulers out of proportion to any additional costs they may impose on New Jersey when compared to New Jersey waste haulers. If the costs imposed on the state by in-state and out-of-state haulers are equivalent, but out-of-state haulers are charged a fee which, measured by the New Jersey activity, is greater than the fee imposed on New Jersey haulers per New Jersey activity then the fee unconstitutionally discriminates against interstate commerce. There was no evidence that out-of-state haulers

imposed a higher cost on New Jersey than did the in-state haulers.

The State presented two fact witnesses, and an expert.

The first fact witness explained how the program worked. The parties have stipulated for purposes of this litigation that the cost of regulating the hazardous waste transportation industry is at least as much as the fees collected. The second fact witness testified that transporters were not deterred by the fee to enter the New Jersey market, that the key determinant of the decision to enter the New Jersey market was the proximity of a garage or other facility to Linden, New Jersey.

Turning to plaintiffs' showings in an effort to countervail the State's proofs, the judge saw their expert's analysis,

when boiled down to its essence, [to have been] that, from a period four years after the tax was imposed, the number of out-of-state carriers active in New Jersey did not decline and their number relative to the number of New Jersey carriers did not decline. Even assuming for a moment that he had properly started his study prior to the imposition of the fee (he did not because he could not assemble the data – see *Glen Wall Assocs.* v. *Wall Tp.*, 99 N.J. 265, 284, 491 A.2d 1247 (1985), warning courts not to impose costly burdens of proof on parties in tax cases) his logic would lead to a conclusion that the fee was not a barrier to the entry of out-of-state haulers into the New Jersey market. But that is not the legal test. It is obvious that a $25 per year fee (amounting to a small percentage of a hauler's total costs) will have an insignificant effect on out-of-state haulers' decisions to either enter or leave the market. The legal test is: does the fee impose a greater cost on out-of-state haulers than on in-state haulers, and if it does has the State proven that out-of-state haulers impose greater costs on the state than do in-state haulers?

Judge Small evaluated the parties' respective showings as follows:

> Plaintiff[s'] expert used the available data to show the aggregate out-of-state haulers' allocation of the flat fee resulted in a cost per manifest (a manifest is required for each trip of hazardous waste in New Jersey) significantly higher than the costs per manifest for New Jersey haulers. The defendant[] spent a great deal of time criticizing this analysis and focused on three issues.
>
> (1) The definition of a non-New Jersey hauler;
>
> (2) The analysis per manifest rather than per ton (i.e. amount of waste hauled);
>
> (3) The analysis on an aggregate rather than a per truck basis.
>
> As a matter of logic, there is much to support the State's criticism – and at its root it lies with the fact that data is kept by company and not by truck.
>
> But in the end, a flat tax is presumptively unconstitutional under *American Trucking Ass'ns* v. *Scheiner*, *supra*. The burden of proving that it does not discriminate is on the defender of the tax. The State's fundamental hypothesis proves nothing. Assuming that the State's analysis shows that no out-of-state hauler withdrew from New Jersey for a period commencing four years after the fee was imposed, it has not shown that the fee does not discriminate against non-New Jersey waste haulers. The State has not attempted to show that the fee fell more or less heavily on in-state or out-of-state haulers.
>
> The State's criticisms of [plaintiffs'] proofs make it difficult for me to conclude that the flat fees fell more or less heavily on plaintiffs than on New Jersey based haulers. Whether the problem is with the definition of which companies are out-of-state haulers (those with 80% or

> more of their vehicles base registered outside of New Jersey are considered out-of-state haulers) as opposed to which trucks are based out-of-state – or whether it is better to do an analysis based on trips or tonnage – the burden of proof to show that the tax does not discriminate is on the State – and it has failed to meet that burden.

In respect of the weight to be accorded the parties' proofs, Judge Small determined and concluded:

> Although the parties have gone to great lengths to prove that the hazardous waste transporter fee does or does not discriminate against non-New Jersey waste haulers, both have failed to persuade me.
>
> Plaintiff's analysis is flawed because:
>
> (1) It used data which was not disaggregated by trucks but by company and interstate companies have vehicles base registered both inside and out of New Jersey.
>
> (2) It used an arbitrary definition of New Jersey waste haulers which defendant showed would yield substantially different results if altered so that one other "out-of-state" company with less than 80% of its vehicles (but more than 50%) which were registered outside of New Jersey were included as an "out-of-state" hauler.
>
> Defendant's analysis is flawed because it is based on a before and after comparison, in which the dividing line for before and after is 1993 (an arbitrarily chosen date based on available data) [and] is irrelevant for a tax which was imposed in 1989. Furthermore, even assuming that the state could show that no out-of-state hauler withdrew after 1989, given the parties' concession that the fee was an insignificant part of a waste hauler's cost, it would not have proven anything about the relative burden on intrastate and interstate carriers. Discrimination or burden need not be a motivating factor of behavior before it is found to be discriminatory.

American Trucking Ass'ns v. *Scheiner*, supra, held that: flat fees imposed by individual states for the privilege of conducting a business in the state are unconstitutional if they are not tied to specific activity (i.e. per use like the $9 per manifest fee in this case) or are not subject to a credit if paid to another state (i.e. a vehicle need be registered in only one state in order to use the roads of another.) New Jersey's hazardous waste transporter fee thus is discriminatory.

Nevertheless, the parties, despite *Glen Wall*, *supra*, have expended much time and expense in an attempt to prove that New Jersey's tax does or does not discriminate against interstate commerce.

The cross-examination of each side's witnesses has been far more effective than their direct testimony. [Plaintiffs] have effectively shown that [defendant has] not proven that the fee does not discriminate against interstate commerce. By showing that the number of non-New Jersey based companies participating in the New Jersey market has not declined (for a period commencing four years after the imposition of the fee) the State has proven nothing of constitutional significance.

Lack of adequate data to test a valid hypothesis will not lead to this Court's adoption of a meaningless analysis to prove a legally irrelevant hypothesis.

Judge Small held:

Although [plaintiffs'] proofs are flawed, the burden is on defendant[] and unless defendant[] can show that the fee meets the internal consistency test of the Commerce Clause, or is not imposed disproportionately on out-of-state haulers, it must fail.

Accordingly, neither side has proven what the relative impact of the fee is on in-state and out-of-state haulers.

As to whether the fees challenged in this case are "fair" under the federal statutes, unless a showing (in accord with the stipulated facts of this case) that the fees are all used to regulate the hazardous waste transportation industry is sufficient to constitute "fairness", the State cannot prevail. A federal action invalidating a fee like New Jersey's relied on Commerce Clause standards to determine fairness. See *American Trucking Ass'ns* v. *New Jersey*, 164 N.J. 183, 186, 752 A.2d 1286 (2000) (Long, J., dissenting),(citing Tennessee Hazardous Waste Transporter Fee and Reporting Requirements, 64 Fed. Reg. 54474-54481 (October 6, 1999)).

In the absence of proof of non-discrimination or fairness, and under the presumption that a flat truck fee is violative of the Commerce Clause, I am compelled [to] find that the fee challenged in this case is not valid.

V.

The State's principal argument on appeal is that the transporter fee mechanism should be evaluated by the fairness standard of 49 U.S.C.A. § 5125(g), and that that standard effectively displaces Commerce Clause analysis in appraising the validity of the scheme. Nevertheless, the State concedes that the fairness standard, itself, is informed, to some extent, by Commerce Clause jurisprudence, specifically, the test for user fees. It argues, however, that plaintiffs have failed to prove the transporter fee is not 'fair' under the HMTA. Under the Commerce Clause standard for 'user fees' applied in *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines*, 405 U.S. 707, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972); see also *Northwest Airlines* v. *County of Kent*, 510 U.S. 355, 369, 114 S. Ct. 855, 864, 127 L. Ed. 2d 183, 196-97 (1994), the State argues, plaintiffs have failed to prove the transporter fee is not "a fair approximation of use or privilege for use" and is discriminatory or excessive in consideration of the benefits conferred.

The State's claim that plaintiffs have not proved any disparate impact of the fee is based on several contentions: 1) the level of activity of a hazardous waste hauler is impacted by many economic and market factors ignored by plaintiffs' analysis; 2) the impact of the fees on activity is miniscule, and hence not an undue burden; 3) the analysis is flawed because the definitions of an NNJ transporter and an NJ transporter are based on a misleading and artificial formula; 4) the use of manifests is inappropriate because manifests bear no relation to tonnage hauled or services provided; and 5) the use of tonnage is inappropriate because it is based on aggregated data – individual transporter data is sometimes inconsistent with this, and, like all other analyses conducted by plaintiffs, it ignores the impact of non-fee factors on business activity.

The State argues that DEP cannot calculate an hourly value for its transporter enforcement services and hence is unable to apportion costs among the regulated community. Therefore, for administrative convenience, DEP spreads costs uniformly over the population of registered trucks on a "per-capita" basis. The State argues that any further refinement would be impracticable.

Plaintiffs cite *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995), for the proposition that a state tax or fee that fails the "internal consistency" test is, as a matter of law, unconstitutional as discriminatory. Hence, plaintiffs argue, because the transporter fees do not satisfy the test, we need not consider the actual impact of the transporter fees, i.e., the undueness of the burden, to find them unconstitutional.

Plaintiffs assert they have shown, by various methodologies, including those suggested by the State, that the transporter fees, in fact, discriminate against interstate commerce. Plaintiffs argue that Judge Small disregarded undisputed evidence that the transporter fees have an inherent discrimina-

tory impact on interstate transporters. Plaintiffs also argue that the judge ignored the analysis that showed out-of-state haulers paid between 1.9 and 2.6 times the amount New Jersey companies paid per ton of hazardous waste hauled.

Plaintiffs contend that their experts' analysis of fees per ton hauled based on company headquarters designations utilized the best data available while meeting all of the State's criticisms. They argue that Judge Small, when he held they had failed to establish the discriminatory impact of the fees, erred by not viewing the expert evidence practically and within realistic limits, as required by *Glen Wall Assocs.* v. *Wall Twp.*, 99 N.J. 265, 280-281, 491 A.2d 1247 (1985).

Alternatively, plaintiffs assert, even if the Court finds the applicable standard is "fairness" as set forth by the HMTA, or the Evansville test rooted in the Commerce Clause, the flat fees are still invalid because they are not fairly apportioned and they discriminate in fact by charging fees to hazardous waste haulers that are unrelated to their level of activity in New Jersey.

VI.

The first question for our determination is whether Judge Small correctly assigned the burden of proof in the matter in reaching his findings and conclusions that the State had not met its burden. That, too, is a matter of federal constitutional law.

The party challenging the validity of a state statute on federal Commerce Clause grounds commonly bears the burden of proof. *Hughes* v. *Oklahoma*, 441 U.S. 322, 336, 99 S. Ct. 1727, 1736, 60 L. Ed. 2d 250, 261-62 (1979). Nevertheless, if a statute, on its face or in practical effect, discriminates against interstate commerce, the burden shifts to the state " 'to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at

stake.' " *Id.*, 441 U.S. at 336, 99 S. Ct. at 1736, 60 L. Ed. 2d at 262 (quoting *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 353, 97 S. Ct. 2434, 2446, 53 L. Ed. 2d 383, 400 (1977)).

When unapportioned state fees and taxes are at issue, the United Stated Supreme Court has developed a stricter test, holding that such a fee or tax is unconstitutional if it violates the internal consistency test of *Complete Auto Transit, Inc.* v. *Brady*, *supra*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326. See *American Trucking Ass'ns, Inc.* v. *Scheiner*, *supra*, 483 U.S. at 284, 107 S. Ct. at 2840, 97 L. Ed. 2d at 243. In *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, *supra*, 514 U.S. at 185, 115 S. Ct. at 1338, 131 L. Ed. 2d at 271-72, the Court clearly held that a tax that fails the internal consistency test of Complete Auto Transit is per se unconstitutional.

If a less stringent constitutional test were to be applied, plaintiffs would retain the burden to prove that the fee discriminates in practical effect. That showing is required by the tests applied in *Evansville*, *supra*, 405 U.S. at 716-17, 92 S. Ct. at 1355-56, 31 L. Ed. 2d at 628-29, and in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174, 178 (1970). State regulations that are not discriminatory are analyzed under the Pike undue burden test. *Camps Newfound/Owattona, Inc.* v. *Town of Harrison*, 520 U.S. 564, 582 n.16, 117 S. Ct. 1590, 1602 n.16, 137 L. Ed. 2d 852, 869 n.16 (1997).

Plaintiffs, of course, had the initial burden to show that *Scheiner* applies, i.e., that the fee is unapportioned. If *Scheiner* controls, the burden then shifts to the State to show either that the fee is not discriminatory, or alternatively, that a more accurately apportioned fee is impracticable.

A.

Before determining whether *Scheiner* dictates the beginning point of analysis, we must first address the State's argument that the usual Commerce Clause limitations were displaced by the HMTA. Congress's adoption of the predecessor act in 1975 was designed to provide a basis in law for regulating the safe transport of hazardous materials under a uniform national scheme. Section 5125 of the HMTA sets out preemption rules governing state requirements related to hazardous waste transport. That section authorizes a state authority to "impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material[.]" 49 U.S.C.A. § 5125(g)(1).

We are not persuaded by the State's argument that § 5125 insulates the fees at issue from dormant Commerce Clause control. Before a statute is read to authorize state regulations that burden or discriminate against interstate commerce, "Congress must manifest its unambiguous intent . . . to permit or to approve such a violation of the Commerce Clause[.]" *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458, 112 S. Ct. 789, 802, 117 L. Ed. 2d 1, 24-25 (1992); see also *Hillside Dairy, Inc.* v. *Lyons*, 539 U.S. 59, 66, 123 S. Ct. 2142, 2147, 156 L. Ed. 2d 54, 61 (2003). The required showing is that "Congress affirmatively contemplated otherwise invalid state legislation" and made it unmistakably clear that it nevertheless authorized such legislation. *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91-92, 104 S. Ct. 2237, 2241-42, 81 L. Ed. 2d 71, 79 (1984).

In *Hillside Dairy*, *supra*, 539 U.S. at 65-66, 123 S. Ct. at 2146-47, 156 L. Ed. 2d at 61, the Court explained that § 144 of the Federal Agriculture Improvement and Reform Act of 1996, did not remove California's milk pricing and pooling regulations from Commerce Clause scrutiny. Section 144, codified at 7 U.S.C.A. § 7254, provides:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to

establish or continue to effect any law, regulation or requirement regarding 1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or 2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

The Court held that while the statute clearly contemplated California laws regulating the composition and labeling of milk products and excluded them from Commerce Clause scrutiny, laws regulating pricing were not exempt from such scrutiny because § 144 did not address milk pricing and pooling laws. No adequately specific intent to that end was apparent on the face of the statute. Ibid.

As noted by the Appellate Division, 49 U.S.C.A. § 5125(g), which exists in the context of a section dealing with the subject of pre-emption, specifically addresses state imposition of fees as follows:

(1) A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency purposes.

(2) A State or political subdivision thereof or Indian tribe that levies a fee in connection with the transportation of hazardous materials shall, upon the Secretary's request, report to the Secretary on –

(A) the basis on which the fee is levied upon persons involved in such transportation;

(B) the purposes for which the revenues from the fee are used;

(C) the annual total amount of the revenues collected from the fee; and

(D) such other matters as the Secretary requests.

In the light of the "unambiguous intent" rule referred to in *Wyoming* v. *Oklahoma and South Central Timber* as applied in *Hillside Dairy*, we disagree with the Appellate Division's conclusion that a "fairness" determination by the Secretary of Transportation, for the stated statutory purpose of avoiding a preemption bar, could have a dispositive impact on the question of law whether Congress has evinced an unambiguous intent to preclude application of the Commerce Clause to the fees at issue here. In the absence of a demonstrable intent on the part of Congress to preclude Commerce Clause restraints, no state is at liberty to act in a way that discriminates against or unduly burdens interstate commerce. In *Hillside Dairy*, the language of the statute at issue there was held to satisfy the "unambiguous intent" standard regarding the clearly expressed choice not to limit the state's authority in milk composition and labeling laws; but, in the absence of an equally clear expression regarding milk pricing and pooling laws, Commerce Clause limitations could not be avoided in the latter respects.

49 U.S.C.A. § 5125(g) authorizes the states to impose fees "related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material[.]" (Emphasis supplied.) If a fee meets that standard, USDOT has the authority to waive pre-emption principles in order to permit its imposition. Nothing in the language of the statute, however, "makes unmistakably clear" Congress's intent to remove transport fees from Commerce Clause scrutiny, i.e., respecting issues of discrimination or undue burden. See *American Trucking Ass'ns, Inc.* v. *State of Wisconsin*, 205 Wis. 2d 494, 556 N.W.2d 761, 765 (WiS. Ct. App.), review denied, 207 Wis. 2d 285, 560 N.W.2d 274 (1996).

B.

The next question we must address bears upon the State's argument that the transporter fee mechanism is not a tax and should be evaluated under the standards governing user fees. See, *e.g.*, *Franks & Son, Inc.* v. *State*, 136 Wn.2d 737, 966 P.2d 1232 (Wash. 1998), cert. denied, 526 U.S. 1066, 119 S. Ct. 1458, 143 L. Ed. 2d 544 (1999). It is "the practical effect of [the] challenged tax" that is determinative. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615, 101 S. Ct. 2946, 2951, 69 L. Ed. 2d 884, 893 (1981). The State argues that the transporter fees are regulatory user fees of the type that have been upheld in other contexts and, therefore, should not be evaluated based on the internal consistency test applicable to taxes.

In *Evansville*, *supra*, 405 U.S. 707, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972), the state and municipality charged passengers a $1 fee each time they enplaned a commercial airliner. All passengers were charged the same fee, regardless of whether they were interstate or intrastate travelers. The funds were used to help defray the costs of airport construction and maintenance. *Id.* at 709-710, 92 S. Ct. at 1351-52, 31 L. Ed. 2d at 624-25. The Court applied the following test:

> At least so long as the toll is based on some fair approximation of use or privilege for use . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users.
>
> [*Id.* at 716-717, 92 S. Ct. at 1354-55, 31 L. Ed. 2d at 629.]

The fees in *Evansville* satisfied the standard because all travelers paid the same fee on a per-use basis, and the fee "reflected a fair, if imperfect, approximation of the use of

facilities for whose benefit they are imposed." *Id.* at 717, 92 S. Ct. at 1355, 31 L. Ed. 2d at 629.

If, on the other hand, the transporter imposts are viewed as taxes, they can be upheld only if they satisfy a stricter, four-part standard. A state tax on interstate commerce does not violate the Commerce Clause if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc.* v. *Brady*, *supra*, 430 U.S. at 279, 97 S. Ct. at 1079, 51 L. Ed. 2d at 331.

In *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, *supra*, 514 U.S. 175, 183-85, 115 S. Ct. 1331, 1337-38, 131 L. Ed. 2d 261, 270-72 (1995), the Court reaffirmed the four-prong test of Complete Auto Transit and explained further that a fairly apportioned tax is one that is both internally and externally consistent. The Court in Jefferson Lines stated that the internal consistency test

> asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.
>
> [*Id.* at 185, 115 S. Ct. at 1338, 131 L. Ed. 2d at 271-72.]

A state's tax may not reach "beyond that portion of value that is fairly attributable to economic activity within the taxing state." *Ibid.* The Court in Jefferson Lines upheld a sales tax on tickets for bus travel that originated in Oklahoma, regard-

less of whether the travel was interstate or intrastate. Because the tax was assessed only if Oklahoma was the point of departure, the imposition by other States of the same type of tax would not place interstate travelers at a disadvantage compared to intrastate travelers; everyone would pay one tax per trip, and it would be paid in the state of departure.

In *American Trucking Ass'ns* v. *Scheiner*, *supra*, 483 U.S. 266, 107 S. Ct. 2829, 97 L. Ed. 2d 226, the Court applied the test of *Complete Auto Transit* v. *Brady* in striking down two lump-sum annual taxes imposed by Pennsylvania on operators of trucks using Pennsylvania highways. The first tax was a $25 flat "marker" fee introduced in 1980 for trucks over a specified weight, but excluding trucks registered in Pennsylvania, which were deemed to have paid the charge as part of their motor vehicle registration fees. See *id.* at 273-74, 107 S. Ct. at 2835, 97 L. Ed. 2d at 236. The second was a $36 per axle tax introduced in 1982 for all trucks over a specified weight, regardless of state of registration, with provisions for rebates and exemptions for infrequent users. See *id.* at 274, 107 S. Ct. at 2835, 97 L. Ed. 2d at 237. Pennsylvania had structured both taxes so that, effectively, only out-of-state truckers were required to pay them.

The Court held that both taxes failed the internal consistency test, because "if each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." *Id.* at 284, 107 S. Ct. at 2840, 97 L. Ed. 2d at 243. In addition, the taxes were seen as discriminatory in practical effect, because the fee charged to out-of-state truckers imposed a cost per mile that was five times greater than that paid by the in-state truckers. See *id.*, 483 U.S. at 286, 107 S. Ct. at 2841-42, 97 L. Ed. 2d at 244-45. Finally, the taxes failed the fourth prong of *Complete Auto Transit* because, having no relationship to activity within the state, they posed an undue burden on interstate commerce. See *id.* at 291, 107 S. Ct. at 2844, 97 L. Ed. 2d at 247-48.

The Court distinguished Pennsylvania's unapportioned taxes from the "neutral user fees" of *Evansville*. See *id.* at 289-90, 107 S. Ct. at 2843-44, 97 L. Ed. 2d at 246-48. The Court found that, unlike the $1 per trip fee in *Evansville*, the Pennsylvania taxes discriminated because the out-of-state vehicles were subject to much higher costs per mile traveled in the state, and the taxes did "not even purport to approximate fairly the cost or value of the use of Pennsylvania roads." *Id.* at 289-290, 107 S. Ct. at 2843-44, 97 L. Ed. 2d at 247.

Of course, the label used by the State for the exactions assessed has no effect on the result. The Supreme Court, for apparent ease of reference, tends to use the term "tax" to refer to an impost that is impermissible because it discriminates against or unduly burdens interstate commerce; and it tends to use the term "fee" for a charge that reflects – fairly, evenly, and sustainably – the States' police power interests and concerns. The critical question in all instances is whether the impact of a charge, as a matter of normative evaluation, is such that the impost can fairly be classified as a tax, i.e., simply a revenue-raising measure; or as a "regulatory fee," i.e., a reasonable charge designed with adequate care to require the payor to shoulder its fair share of support for state services or of the costs attributable to the regulated and regulatable activities. See *id.* at 282-83, 294, 107 S. Ct. at 2839-40, 2846, 97 L. Ed. 2d at 242-43, 249-50.

We are mindful that in *Scheiner*, the Court evaluated flat per-axle fees, as well as marker fees, the proceeds of which were used to fund general highway maintenance and repairs. It held that unapportioned taxes or fees violate the Commerce Clause. The Court, however, has not specifically determined whether an unapportioned fee used exclusively to fund a regulatory safety and inspection program should be considered under the same standard.

Plaintiffs argue that there can be no distinction between types of imposts based upon their ultimate objectives. Plaintiffs contend that a flat fee unrelated to the level of use violates the Commerce Clause irrespective of the reason why it is imposed. Plaintiffs cite *Scheiner* as authority for this position:

> Now that it has been firmly established that interstate commerce as such has no immunity from state taxation, it is no longer appropriate to uphold a flat tax merely because the particular formula by which its charges are reckoned extends the same nominal privilege to interstate commerce that it extends to in-state activities. Such formalism "merely obscures the question whether the tax produces a forbidden effect."
>
> [*Id.* at 295-296, 107 S. Ct. at 2846-47, 97 L. Ed. 2d at 250-51 (quoting *Complete Auto Transit*, *supra*, 430 U.S. at 288, 97 S. Ct. at 1083, 51 L. Ed. 2d at 326).]

It is "the practical consequence of the tax" that controls; not the character of the privilege taxed. *Id.* at 294-95, 107 S. Ct. at 2846, 97 L. Ed. 2d at 250.

Scheiner distinguished the Pennsylvania flat taxes from a severance tax based on the amount of coal consumed that was found constitutional in *Commonwealth Edison Co.* v. *Montana*, *supra*, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884. One distinction was that the amount of taxes did not "vary directly with miles traveled or with some other proxy for value obtained from the State." *Scheiner*, *supra*, 483 U.S. at 291, 107 S. Ct. at 2844, 97 L. Ed. 2d at 247. On this point, the Court adopted Justice Frankfurter's dissenting view in *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 557, 70 S. Ct. 806, 814, 94 L. Ed. 1053, 1062 (1950):

> So long as a State bases its tax on a relevant measure of actual road use, obviously both interstate and intrastate carriers pay according to the facilities in fact provided by

> the State. But a tax levied for the privilege of using roads, and not their actual use, may, in the normal course of operations and not as a fanciful hypothesis, involve an undue burden on interstate carriers. While the privilege extended by a State is unlimited in form, and thus theoretically the same for all vehicles, whether interstate or intrastate, the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego the privilege some of the time simply because of its interstate character, i.e., because it operates in other States as well. In the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier.

Although *Scheiner* involved fees that were arguably revenue raising measures, three state court decisions have analyzed flat transporter fees not dissimilar from those involved here under the *Scheiner* standard for unapportioned taxes. In all three of those cases, the courts held the flat fees to be structurally unsound, i.e., discriminatory, because they failed the internal consistency test. Those courts did not require the complaining party to submit specific proofs of actual discrimination. See *American Trucking Ass'ns, Inc.* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991); *American Trucking Ass'ns, Inc.* v. *Secretary of Administration*, 415 Mass. 337, 613 N.E.2d 95, 101 (Mass. 1993); *American Trucking Ass'ns, Inc.* v. *State of Wisconsin*, *supra*, 556 N.W.2d 761.

The State argues that it is constitutionally significant whether a "flat fee" is a "regulatory user fee" or a revenue generating tax. The State argues that the transporter fees at issue here are regulatory user fees and should not be analyzed under the stricter internal consistency test of *Complete Auto Transit*, which it asserts is reserved for revenue raising taxes. The State characterizes the imposts as regulatory user fees imposed under the State's police power, incident to a transporter's voluntary request for the privilege to engage in the

regulated activity of hazardous waste transport. See *National Cable Television Ass'n, Inc.* v. *United States*, 415 U.S. 336, 340-41, 94 S. Ct. 1146, 1149, 39 L. Ed. 2d 370, 375 (1974). Accordingly, it contends that the public agency may exact a fee for supervising the activity that benefits the transporter.

The State contends that the *Evansville* test may be used to sustain a broader set of regulatory fees than the per-use fee involved in that case, and it likens the charges here to the user fees in *Evansville* by noting that, like the *Evansville* fees, the revenue collected is devoted to services that benefit only the group paying the fee. Plaintiffs concede, as determined by the Appellate Division, "that the fees are clearly not a form of hidden tax revenue production," 324 N.J. Super. at 10, and also "that the fees collected are approximate to and used for actual transporter program costs."

Nevertheless, any similarity that may exist between the fees here and those in *Evansville* is not dispositive. The critical feature that renders a "fee" a "user fee" entitled to *Evansville* analysis is that it is apportioned in some way demonstrably related to the use of or privilege to use the service or facility for the maintenance of which the fee is imposed.

The State also suggests that if we hold apportionment of the subject regulatory fees to be required, other fees, such as those for professional licensing, would be subject to attack on Commerce Clause grounds by out-of-state persons or entities who pursue their callings infrequently in New Jersey.

In *Franks & Son, Inc.* v. *State*, *supra*, 966 P.2d 1232, cert. denied, 526 U.S. 1066, 119 S. Ct. 1458, 143 L. Ed. 2d 544, (1999), the court upheld a gross weight regulatory fee on trucks, covering various services including safety inspections for vehicles. The lower court had held that plaintiffs had not shown the regulatory fee discriminated against interstate commerce, because the court saw no correlation between safety and inspection services and miles traveled. It

nevertheless determined that the fee was impermissible under the Commerce Clause because it violated the internal-consistency/fair-apportionment prong of *Complete Auto Transit*.

The Supreme Court of Washington reversed, holding that the fee was a "regulatory fee" and not a tax, hence constitutional, because the record showed no direct evidence of discrimination and the internal consistency test was inapplicable. *Id.* 966 P.2d at 1237. The court explained:

> The regulatory, police power of a state and its power to tax are treated differently for constitutional purposes.
>
> "The burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations." *Freeman* [v. *Hewit*], 329 U.S. [249, 253, 67 S. Ct. 274, 91 L. Ed. 265 (1946)]. Because "the power to tax is a dominant power over commerce . . . . attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of [interstate] commerce." *Id.*
>
> [*Id.* 966 P.2d at 1238.]

The court used a three-part test to determine whether a charge is a fee or a tax: first, whether the primary purpose of the assessment is to regulate or to generate revenue; second, whether the money collected is allocated only to the authorized regulatory purpose; and third, whether there is "a direct relationship between the fee charged and the services received by those who pay the fee or between the fee charged and the burden produced by the fee payer." *Id.* at 1239. Determining that the fee was adjustable to the cost of regulation, the court found that it was a "regulatory fee, not a flat tax." *Ibid.* In upholding the fee, the court applied the less stringent "undue burden" test of *Pike* v. *Bruce Church, Inc.*, *supra*, 397 U.S. at 142, 90 S. Ct. at 847, 25 L. Ed. 2d at 178, with-

out expressly articulating why it applied that test. The Pike test, however, is reserved for state regulations that do not patently discriminate against interstate commerce. See *Camps*, *supra*, 520 U.S. at 583 n.16, 117 S. Ct. at 1602 n.16, 137 L. Ed. 2d at 869 n.16.

The United States Court of Appeals had used similar reasoning in applying the *Pike* undue burden test to uphold a flat licensing fee. See *V-1 Oil Company* v. *Utah State Department of Public Safety*, 131 F.3d 1415, 1422-23 (10th Cir. 1997). Pursuant to a its statute providing a system of safety regulations for the liquefied petroleum gas (LPG) industry, Utah enacted a licensure requirement for anyone who sold, transported, dispensed, or stored LPG in that state. *Id.* at 1418. The Plaintiff was the owner and operator of four LPG facilities within Utah and two facilities in other states. It sued because the State had compelled it to pay the $225.00 fee for the out-of-state facilities that served residential customers in Utah.

The Circuit Court rejected the idea that the licensing fees were taxes:

> We believe that there is considerably more to the police-power-based-regulatory-fee-versus-tax dichotomy than the parties have maintained. While a regulatory police power fee that is reasonable in relationship to its costs is almost always sustained, see *Aldens, Inc.* v. *LaFollette*, 552 F.2d 745, 749-50 (7th Cir. 1977), a tax with effects upon interstate commerce is "more carefully scrutinized and more consistently resisted . . . ." *Freeman* v. *Hewit*, 329 U.S. 249, 253, 67 S. Ct. 274, 276, 91 L. Ed. 265 (1946). See also *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174 (1970)(outlining balancing test for a nondiscriminatory regulation).
>
> [*Id.* at 1422.]

The court analyzed Utah law for its distinction between licensing fees and taxes, and held that "the assessments involved here cannot be characterized as use or excise taxes, but rather as an unadorned fee assessed to help defray the costs of inspecting LPG facilities and to ensure that all LPG handlers providing LPG services within the State of Utah meet minimum standards of safety." *Id.* at 1423.

The court then analyzed the licensing fee under the *Pike* three-factor test: "1) whether there is the furtherance of a legitimate local public interest; 2) whether the statute regulates evenhandedly; and 3) whether the statute places an undue burden on interstate commerce." *Id.* at 1424. It viewed regulation of hazardous materials as clearly a matter of legitimate local public interest, *ibid.*, and determined that the State imposts regulated evenhandedly because the fees were imposed on in-state and out-of-state facilities in the same amounts. *Id.* at 1424-25. The court distinguished *Scheiner* by suggesting that while Pennsylvania's tax on all truckers had created a financial barrier to the free movement of commerce, the Utah regulation did not affect all commercial trucks but only regulated what the State "reasonably thinks is a potentially dangerous or troublesome activity carried on within its borders." *Id.* at 1425. The court determined that interstate commerce was not unduly burdened because any burdens that existed were "purely incidental." *Id.* at 1427.

Based upon a fair reading of *Scheiner* and a straightforward application of the principles informing it, we reject the State's arguments and respectfully disagree with the rationales employed in *Franks and Son* and *V-1 Oil*. We are in essential agreement with Judge Small's determinations for the reasons he stated, that plaintiffs have made a sufficient prima facie showing of discrimination against interstate commerce to shift the burden to the State to show that the impositions pass constitutional muster. Plaintiffs have demonstrated that the fee mechanism at issue is structurally discriminatory, and they should not be compelled to prove the precise level of the

per-activity cost disparity. As the Court noted in *Chemical Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 342, 112 S. Ct. 2009, 2014, 119 L. Ed. 2d 121, 132 (1992), "once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." See also *Associated Industries of Missouri* v. *Lohman*, 511 U.S. 641, 650, 114 S. Ct. 1815, 1822, 128 L. Ed. 2d 639, 648-49 (1994); *Maryland* v. *Louisiana*, 451 U.S. 725, 760, 101 S. Ct. 2114, 2136, 68 L. Ed. 2d 576, 604 (1981); *Oregon Waste Systems, Inc.* v. *Department of Env. Quality*, 511 U.S. 93, 100, 114 S. Ct. 1345, 1350, 128 L. Ed. 2d 13, 22 (1994).

We also agree that, on the record developed, the State has not met its burden to establish that Commerce Clause standards have not been violated. No minimally persuasive showing has been made that the fees are adequately apportioned in a way that bears a sufficiently clear and direct relationship to State services rendered to those subject to the charges. Thus, the hazardous waste transporter registration fees as currently framed may not be validly applied to plaintiffs and other interstate transporters.

We reject the State's contention that as long as a "flat fee" is a "regulatory user fee," it is not subject to the four-prong test of *Complete Auto Transit*. Such a view ignores the underlying rationale of *Scheiner* that it is the practical effect of the charge that controls, not its formal language or purported structure. *Scheiner*, *supra*, 483 U.S. at 294-95, 107 S. Ct. at 2846, 97 L. Ed. 2d at 250. The State has failed to demonstrate that the charges at issue are different in practical effect than those invalidated in *Scheiner* because "they discriminated against out-of-state vehicles by subjecting them to a much higher charge per mile traveled in the State, and they [did] not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads." *Id.* at 290, 107 S. Ct. at 2844, 97 L. Ed. 2d at 247.

The State has provided no basis in principle and reason, as distinguished from form, for applying the *Evansville* standard and the Pike rationale. The only similarity the State offers between the fees here and those in *Evansville* is that both are nominally used to fund regulatory programs and are not general revenue raising measures, as the State proposes was so in *Scheiner*. However, the "user fees" found sustainable under the Commerce Clause in *Evansville* and *Northwest Airlines Inc.* v. *County of Kent* shared a critical characteristic that the New Jersey fees lack; they were related to the payors' levels of use of the facilities or services the fees were enacted to sustain. In *Evansville*, *supra*, the state charged passengers $1 on a per-trip basis that went to covering the costs of airport construction and maintenance. 405 U.S. at 709, 92 S. Ct. at 1351, 31 L. Ed. 2d at 624-25. In *Northwest*, *supra*, each airline was charged a fee in proportion to its use of the airfield to defray costs for maintenance of the airfield. 510 U.S. at 359, 114 S. Ct. at 859, 127 L. Ed. 2d at 190.

Attributing to plaintiffs' prima facie showing the burden-shifting effects allowed by Judge Small, we conclude that the State has failed to prove the validity of the charges at issue here. The transporter fees fail the internal consistency test; they discriminate against interstate commerce; and they impose an undue burden on interstate commerce. The transporter fees threaten "the free movement of commerce by placing a financial barrier" around the State of New Jersey. See *Scheiner*, *supra*, 483 U.S. at 284, 107 S. Ct. at 2840, 97 L. Ed. 2d 243.

The fees at issue do not survive two of the four tests required by *Complete Auto Transit* v. *Brady*, *supra*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326. The fees are not fairly apportioned – the same fee is imposed on each vehicle delivering or picking up hazardous waste in New Jersey, regardless of the number of trips the vehicle makes. The State argues that that impact is mitigated because no other state could charge a fee for regulating collection or delivery of

hazardous waste in New Jersey. Hence, the State contends, the transporter registration fees cannot fail a fair internal consistency test.

The answer is clear, however. Even though the fees at issue may be targeted appropriately, i.e., they are imposed on "delivery or collection" not merely on transport of hazardous waste through the State, the fact remains that, among businesses similarly engaged, out-of-state truckers will pay a distinctly higher cost per activity on average than in-state truckers will pay. Given that flat charges are involved, the key is the frequency with which New Jersey-based operations conduct their activities in this State as compared to non-New Jersey entities.

The State has failed to show that the apparent discrimination engendered by the fees is not real in fact. Plaintiffs, on the other hand, have made a prima facie showing that the fees discriminate in practical effect. Plaintiffs have shown that, based on several measures, out-of-state truckers pay between twice as much and almost three times as much as in-state truckers pay. The State has presented little by way of affirmative proof, and its efforts to discredit plaintiffs' showings have been to no avail. Its critiques of plaintiffs' methodology regarding the eighty-percent/twenty-percent paradigm to distinguish the activities of out-of-state truckers from those operating in-state, and the use of fees per manifest as a basis of comparison, do not go far enough to defeat the entirety of plaintiffs' analysis, which is also based on cost-per-ton for all companies, and shows that non-New Jersey companies paid between 1.9 and 2.6 times more than New Jersey companies did between 1994 and 2000.

Another critique offered by the State is that plaintiffs' aggregate-level analysis masked data showing that individual out-of-state companies had lower costs per manifest or costs per tonnage than NJ companies experienced. As *Scheiner* clearly indicates, however, the discriminatory effect of a fee

can only be conducted based on averages. The Court explained that since intrastate carriers always use the state's roads, they are the primary beneficiaries of a flat tax and " 'in the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier.' " *Scheiner*, *supra*, 483 U.S. at 291, 107 S. Ct. at 2844, 97 L. Ed. 2d at 248 (quoting Frankfurter, J., dissenting in *Capitol Greyhound*, *supra*, 339 U.S. at 557, 70 S. Ct. at 814, 94 L. Ed. at 1053). The Court also explained:

> Nor is the axle tax saved because some out-of-state carriers which accrue high mileage in Pennsylvania pay the axle tax at a lower per-mile rate than some Pennsylvania-based carriers; it makes no difference that the axle tax, on its face, does not exact a lower per-mile charge from Pennsylvania-based carriers than from out-of-state carriers. Like the exemption from wholesaling tax for goods manufactured in Washington that we struck down in *Tyler Pipe Industries, Inc.*[v. *Washington Dept. of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987)], the axle tax has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than "among the several States."
>
> [*Id.* at 286-87, 107 S. Ct. at 2842, 97 L. Ed. 2d at 245.]

Throughout the history of this case, the State has also argued that measures of the effects of the fees, such as the cost "per manifest" or "per ton" for out-of-state transporters compared to New Jersey operations, are meaningless because tonnage and manifests are primarily influenced by non-fee factors such as proximity to generators or disposal sites, fleet size, common ownership with other hazardous waste businesses, safety records and the like. The State has argued that plaintiffs should have used an econometric model to control for the impact of those external factors on the differences be-

tween in-state and out-of-state tonnage or number of manifests, and that if they had done so, the independent impact of the fee on tonnage or manifests would be insignificant.

We reject that argument as well, because it is based on a faulty premise. Plaintiffs are not claiming that the fees are the cause of their "transporter performance" i.e., the tonnage hauled or the number of manifests per company, but rather that, given their transporter performance as determined by all pertinent factors, it is inequitable that they pay significantly more per ton or per manifest than firms with vehicles largely registered in New Jersey. The reasoning in *Scheiner* takes as a given that such differential factors exist: "the very nature of the market that interstate operators serve prevents them from making full use of the privilege of doing business for which they have paid the State." *Scheiner*, *supra*, 483 U.S. at 284 n.16, 107 S. Ct. at 2840 n.16, 97 L. Ed. 2d at 243 n.16.

Finally, the State has relied on its own market share analysis between 1993 and 2000 to establish the absence of a discriminatory impact. Its showing is flawed because, without a pre-post analysis, the stable market share trends reported cannot be taken to suggest a lack of discriminatory effect. Plaintiffs' economist testified that it is quite likely a leveling off of exclusionary impact may have occurred by 1993 when the data was first collected.

The fees also impose an undue burden on interstate commerce. As the Court in *Scheiner* explained, " 'when the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce.' " *Id.* at 291, 107 S. Ct. at 2844, 97 L. Ed. 2d at 247-48 (quoting *Commonwealth Edison Co.* v. *Montana*, *supra*, 453 U.S. at 629, 101 S. Ct. at 2959, 69 L. Ed. 2d at 902.) Clearly, here, the unapportioned fees are unrelated to activity in the State, and, hence, pose an undue burden on commerce.

In summary, we hold, based upon the record that has been developed, that the transporter fee mechanism lacks internal consistency; it discriminates against interstate commerce by charging a flat fee unrelated to a transporter s level of activity in the State; and it places an undue burden on interstate commerce.

The Court in *Scheiner* explained that an unapportioned tax may survive, even if it fails the tests of *Complete Auto Transit*, if it is "the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens." *Scheiner*, *supra*, 483 U.S. at 296, 107 S. Ct. at 2847, 97 L. Ed. 2d at 251. The State, in an effort to distinguish the facts of *Scheiner* and, thus, avoid its impact, argues that the transporter fees are assessed for services that are unrelated to mileage. The State also claims the fee has no relationship to manifests or tonnage. We reject those contentions as well. While any given activity may be unrelated to tonnage o: the number of manifests of a particular transporter, on average transporters with more mileage, manifests, and tonnage will receive more services. *Cf. ATA Ass'ns, Inc.* v. *Secretary of State*, 595 A.2d 1014, 1017 (Me. 1991) (observing that "considering the actuarial considerations any state must take into account in preparing itself for emergencies, we find counterintuitive the State's argument that it does not take miles traveled, and thus time on the roads, into consideration in determining the required amount of preparedness").

We discern no compelling need to structure the New Jersey transporter registration fees on an unapportioned basis. The State could apportion a transporter fee based on several measures of activity including manifests, mileage or tonnage hauled. Its argument that apportionment based on some measure of activity is impracticable lacks power, for it appears that it is based only on relating the cost of the fee to the level of services actually provided. This is not the only basis that might be employed, however. An apportionment based

on tonnage hauled or mileage would be a link to the level of activity that might render the fee constitutional. The State has not established the impracticability of implementing a fee with such a potentially permissible basis. Therefore, it cannot be heard to assert the argument it makes. See *American Trucking Ass'ns* v. *Wisconsin*, *supra*, 556 N.W.2d at 768 (ruling that the State "cannot justify imposing a flat unapportioned fee solely because it had not made the studies necessary to structure a constitutionally apportioned fee").

VII.

For the reasons we have stated, we hold the hazardous waste transporter registration fee mechanism embodied in N.J.S.A. 13:1E-18, as implemented by N.J.A.C. 7:26G-3.3(g) and applied to plaintiffs and others similarly situated, to be in violation of Commerce Clause standards. We reverse the Appellate Division's judgment of June 15, 1999, reinstate the Tax Court's March 23, 1998 grant of partial summary judgment to plaintiffs and its denial of the State's cross-motion for summary judgment, and remand to the Tax Court for such further proceedings on the reserved issues as may be necessary to conclude the matter.

CHIEF JUSTICE PORITZ and JUSTICES VERNIERO, ZAZZALI, ALBIN, and WALLACE join in JUDGE KESTIN's (temporarily assigned) opinion. JUSTICES LONG and LaVECCHIA did not participate.

(1) (4) (4)

No. 03-1230, 03-1234, and 03-1250

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,
and USF HOLLAND, INC., *Petitioners,*
v.
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

MID-CON FREIGHT SYSTEMS, INC ET AL, *Petitioners*
v.
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

TROY CAB, INC, ET AL, *Petitioners*
v.
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

On Petitions For Writs of Certiorari
To The Michigan Court of Appeals

RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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On June 7, 2004, this Court invited the U.S. Solicitor General to file a brief expressing the views of the United States. On December 17, 2004, the United States filed its brief as amicus curiae. This supplemental brief responds to the Brief of the United States.

INTRODUCTION

The most significant aspect in these cases is the almost total absence of facts to support the Petitioners' claims. Despite having numerous opportunities to present facts to the trial court the Petitioners failed to do so. Thus, following the filing of motions for summary dispositions, the Petitioners' lawsuits were dismissed in accordance with the Michigan Court Rules. The Michigan Court of Appeals below made repeated references to the Petitioners' failure to develop a factual record.

Despite Petitioners' failure to develop a factual record, the United States, as amicus curiae, argues that certiorari should be granted in two cases (Case Nos. 03-1230 and 03-1234) and at one point even suggests that this Court decide the law and consider remanding the matter back to the Michigan courts for the development of a factual record. This clearly is placing the cart before the horse. Moreover, it effectively nullifies the requirement under the Michigan Court Rules, that a litigant, when challenged, has the obligation to set forth facts that supports its claims. Because of the lack of an adequate factual record and because of a lack of a meaningful conflict between the Michigan Court of Appeals' decision and a decision of another state court or a United States Court of Appeals, certiorari should be denied in all three cases.

A. Case No. 03-1230

The brief for the United States, despite its recommendation to the contrary, confirms that the petition in 03-1230 does not warrant this Court's review. In footnote 11, appearing on page 17 of its brief, the United States candidly admits that the record fails to show "the extent" to which the Michigan fee "actually deters

out-of-state carriers from competing with intrastate hauls" or "the extent" to which the fee "otherwise affects out-of-state carriers disproportionately or burdens interstate commerce." The footnote then concludes, saying:

> Accordingly, if the Court grants review in No. 03-1230 and articulates a general framework for analyzing fees as the one imposed by Section 478.2(1) under the Commerce Clause, the Court may find it appropriate then to remand this case to the Michigan Courts for application of that framework, including the development of any further factual record that may be necessary.

In short, the United States is asking this Court to issue an advisory opinion on the controlling law in the absence of facts supporting the Petitioners' claims.

There are problems with this approach, however. First, while the Court may attempt to anticipate and decide all aspects presented with this claim, subsequent remand proceedings may very well demonstrate that a critical question was not addressed, perhaps necessitating further review by this Court. In short, because the facts have not been fully developed, No. 03-1230 is not suitable for review. Second, such an approach effectively nullifies Michigan Court Rule (MCR) 2.116(C)(10), that provides that summary disposition is properly granted against a party when that party fails to present evidence to support its claims. As the Respondents noted in their Brief in Opposition the Michigan Court of Appeals determined that the Petitioners' claim was a "matter of pure speculation" and affirmed the trial court's grant of summary disposition against Petitioners. Were this Court to grant certiorari in the manner suggested by the United States, Petitioners would effectively be permitted to evade MCR 2.116(C)(10), without the wisdom or basis of that court rule ever being addressed.

Finally, the claim by the United States that the Michigan Court of Appeals' decision brings it into conflict with the highest courts of three States is misplaced. As the Respondents noted and explained in their Brief in Opposition the charges that were assessed in those cases bear little similarity to and were of an entirely different character than the fee challenged here. Moreover, it is clear that in each of those cases the challenges involved a more fully developed factual record than presented here. Indeed in *American Trucking Ass'n v New Jersey*, 852 A2d 142, 146 (2004), the New Jersey Supreme Court specifically noted that in 2000 it had issued an order [752 A2d 1286 (2000)] remanding the case back to the trial court due to the "need for a well-developed factual record before deciding the ultimate constitutional issues." The need for a well-developed factual record to support Petitioners' claims in this case is no less than in the case before the New Jersey Supreme Court. Here, however, the Petitioners waived that opportunity by failing to present facts to the trial court when it was required to do so under the Michigan Court Rules. Eleventh-hour attempts to resuscitate Petitioners' claim without the evidence to support it do not warrant the granting of certiorari.

B. Case No. 03-1234

The Petitioners in No. 03-1234 likewise failed to present evidence to support their claims when required to do so by the Michigan Court Rules. Instead their challenge is based on erroneous, speculative, and exaggerated claims as fully detailed in the Respondents' Brief in Opposition. The United States' brief fares no better in that it overlooks the fact that the fee charged by Michigan Compiled Laws (MCL) 478.2(2) is a regulatory fee that applies only to those interstate motor vehicles that are base-plated in Michigan. The failure to recognize this critical distinction reflects a fundamental misunderstanding of the Michigan law.

When discussing whether the Single State Registration System (SSRS) preempts the $100 fee imposed by Michigan under MCL 478.2(2), the United States says, "The question here

is not whether a State may impose *any* taxes or fees on motor carriers; instead, the question is whether it may impose fees covered by the SSRS in excess of the amounts permitted by the SSRS." Brief for the United States, p 9. (Emphasis in original). Yet, when quoting from the SSRS, 49 USC § 14504(c)(2)(C), the United States omits important controlling language. This statute states, "The charging or collection of any fee under this section that is not in accordance with the fee system *established under subparagraph (B)(iv) of this paragraph* shall be deemed to be a burden on interstate commerce." (Language omitted by the United States is in italics).

Subparagraph (B)(iv) of 49 USC § 14504 states:

> (iv) [The standards of the Secretary] shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that –
>
> > (I) is based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates;
> >
> > (II) minimizes the costs of complying with the registration system; and
> >
> > (III) results in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and . . . .

It is clear from this unambiguous language that the reliance by the United States on 49 USC § 14504 is misplaced. The reference to "the charging or collection of any fee under this section that is not in accordance with the fee system * * * shall be deemed to be a burden on interstate commerce" relates to fees for filing interstate motor carrier's proof of insurance, not a regulatory fee that includes safety reviews, investigations and roadside enforcement by Michigan State Police. See Affidavit of Thomas R. Lonergan, ¶¶ 16, 23-25, (Respondents' Brief in Opposition, Case No. 03-1234, Res. App. pp 10b, 14b-16b);

Affidavit of Captain Timothy J. Yungfer, ¶¶ 2-12 (Respondents' Brief in Opposition, Case No. 03-1234, Resp. App. pp 30b-32b).

SSRS compliance can be found under MCL 478.7, mandating a $10.00 maximum fee for the filing of an interstate motor carrier proof of insurance and Interstate Commerce Commission (ICC) permit. To help defray the costs of safety regulation and enforcement on Michigan highways, MCL 478.2(2) imposes a $100 fee on vehicles that are issued Michigan license plates. Michigan does not collect the $100 fee from interstate motor carriers that are not base-plated in Michigan.

In support of its argument, the United States cites *State Ex Rel Sammons Trucking, Inc v Boedecker*, 158 Mont 397; 492 P2d 919 (1972). In that case, the Montana Public Commission registered all interstate carriers under the state statute. The Court held that the federal bingo card system, including regulations promulgated by the ICC, was controlling over contrary state law provisions. In this case, there is no conflict between federal and state law. Unlike MCL 478.2(2), the Montana fee specifically related to the issuance of the state certificate to all motor carriers. The regulatory fee under MCL 478.2(2) is not a fee charged to allow vehicles to cross into the state territory but rather the fees are only imposed on Michigan-plated carriers to cover the cost of safety regulations.

C. Case No. 03-1250

The Respondents agree with the United States that the Petition in No. 03-1250 does not warrant certiorari.

CONCLUSION

The failure of the Petitioners in 03-1230 and 03-1234 to present facts to support their claims when required to do so under the Michigan Court Rules justified the dismissal of those claims by the trial court. As such, they are not suitable for review by this Court.

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Nos. 03-1230, 03-1234, and 03-1250

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In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC., PETITIONERS

v.

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MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The State of Michigan imposes upon motor carriers licensed in that State a $100 annual fee for each vehicle registered in the State and "operating entirely in interstate commerce." Mich. Comp. Laws Ann. § 478.2(2) (West 2002). Michigan also imposes upon motor carriers a $100 annual fee for each vehicle that operates at least in part in intrastate transportation. *Id.* § 478.2(1). The questions presented are:

(1) Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U.S.C. 14504.

(2) Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.

(3) Whether the $100 fee upon vehicles conducting intrastate operations is preempted by 49 U.S.C. 14501.

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This brief is submitted in response to the orders of this Court inviting the Acting Solicitor General to express the views of the United States. Because all three petitions challenge the same decision of the Michigan Court of Appeals, this consolidated brief responds to all of the Court's orders.

STATEMENT

1. a. In 1965, Congress authorized States to impose registration requirements on interstate motor carriers operating within their borders. 49 U.S.C. 302(b)(2) (1970). Congress determined that such requirements would not constitute undue burdens on interstate commerce insofar as they were consistent with regulations promulgated by the Interstate Commerce Commission (ICC). *Ibid.*; *Yellow Transp., Inc.* v. *Michigan*, 537 U.S. 36, 39 (2002).

Until 1994, the ICC permitted each State to charge an interstate motor carrier operating within its borders an annual registration fee of up to $10 per vehicle. 49 C.F.R. 1023.33 (1992). This became known as the "bingo card" system because each State issued a stamp for each vehicle, and the motor carrier affixed the stamp to a card carried in the vehicle, as proof of registration. 49 C.F.R. 1023.32 (1992); *Yellow Transp.*, 537 U.S. at 39.

In order to reduce administrative burdens on motor carriers, Congress directed the ICC in 1991 to implement a new system, called the Single State Registration System (SSRS), under which each motor carrier "register[s] annually with only one State." 49 U.S.C. 14504(c)(1)(A).[1] Under the SSRS, each State may still charge a fee, "equal to the

[1] The 39 States that participated in the bingo card system as of January 1, 1991, are eligible to participate in the SSRS. 49 U.S.C. 14504(c)(2)(D). The 11 ineligible States are listed in H.R. Rep. No. 171, 102d Cong., 1st Sess. Pt. 1, at 49 (1991). Oregon is eligible to participate but does not do so. Thus, 38 States participate in the single-state program.

fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. 14504(c)(2)(B)(iv)(III). Those fees are collected and distributed to other States by the single State in which the vehicle is registered. 49 C.F.R. 367.6(a).

Congress determined that "[t]he charging or collection of any fee under this section that is not in accordance with th[is] fee system * * * shall be deemed to be a burden on interstate commerce." 49 U.S.C. 14504(c)(2)(C). When Congress abolished the ICC in 1995, it assigned authority to administer the SSRS to the Secretary of Transportation. *Yellow Transp.*, 537 U.S. at 39-40 n.* (citing Pub. L. No. 104-88, 109 Stat. 803).

b. Section 601 of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1605, forbids a State from "enact[ing] or enforc[ing] a law, regulation, or other provision * * * related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). Congress enacted that provision out of concern that "'the regulation of intrastate transportation of property by the States' unreasonably burdened free trade, interstate commerce, and American consumers." *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002) (quoting § 601(a)(1), 108 Stat. 1605). Congress specified that Section 601 does not restrict "the safety regulatory authority of a State with respect to motor vehicles," the "authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements," or other regulatory authority regarding the transportation of household goods or non-consensual tow truck services. 49 U.S.C. 14501(c)(2).

2. Michigan imposes three relevant fees on motor carriers. First, under the SSRS, Michigan charges interstate carriers operating in Michigan a maximum annual fee of $10 for each truck licensed in *another* State. Mich. Comp. Laws Ann. § 478.7(4) (West 2002).[2] That fee is not at issue here. Second, "[a] motor carrier licensed in [Michigan] shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier *which is registered in [Michigan]* and operating entirely in interstate commerce." *Id.* § 478.2(2) (the "interstate fee") (emphasis added). Third, Michigan also charges an annual fee of $100 "for each self-propelled motor vehicle operated by or on behalf of [a] motor carrier." Mich. § 478.2(1) (the "intrastate fee"). In practice, Michigan assesses that fee only on trucks that engage in whole or in part in intrastate operations in Michigan. 03-1234 Br. in Opp. App. 8b.

3. In 1995, petitioner Westlake Transportation brought a class action against respondents, alleging that the $100 intrastate and interstate fees are preempted by 49 U.S.C. 14501 and 14504. Shortly thereafter, petitioner Troy Cab and other petitioners filed a class action making similar allegations, and petitioners American Trucking Associations and USF Holland filed suit alleging that the intrastate fee violates the Commerce Clause of the United States Constitution, Art. I, § 8, Cl. 3. After all of the petitioners amended their complaints to adopt each others' claims, the Michigan Court of Claims consolidated the cases, certified the classes, and granted summary disposition to respondents. 03-1234 Pet. App. 36- 72.

The Court of Claims determined that the $100 interstate fee is not preempted by federal law because the SSRS "places a $10.00 annual vehicle fee limit on only the 'participating states,' * * * not on the 'registering state,'" and Michigan's $100 interstate fee applies only to vehicles registered in Michigan. 03-1234 Pet. App. 46; accord *id.* at

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[2] As explained above, under the SSRS, that fee is actually collected by the State in which the carrier is registered and then paid over to Michigan. See pp. 1-2, *supra*.

68-69. The court also upheld the intrastate fee against petitioners' Commerce Clause challenge because the fee applies only to carriers that choose to engage in point-to-point transportation of property wi[illegible]n Michigan, and the fee was intended to ensure that vehicles and carriers that provide intrastate service on Michigan highways comply with Michigan's safety and fitness norms. *Id.* at 48-49. Finally, the court held that Section 601 of the FAAAA does not preempt the intrastate fee, noting that Michigan has not used the fees to engage in preempted economic regulation. *Id.* at 44-45.

4. The Michigan Court of Appeals affirmed. 03-1234 Pet. App. 1-35. The Court of Appeals disagreed with the Court of Claims' conclusion that the SSRS imposes no limit on fees charged by the States in which the carrier is registered. "A registration state is simply a participating state in which a motor carrier is registering," the court explained, and the federal statute draws no distinction between the two. *Id.* at 15. Nonetheless, the court held that the interstate fee is not preempted under the SSRS (or the predecessor bingo card system) because it "could reasonably be classified as a regulatory fee," as opposed to a "registration fee." *Id.* at 16; accord *id.* at 19. The court concluded that "[i]f the purpose of a fee is to regulate an industry or service, it can be properly classified as a regulatory fee" exempt from federal preemption. *Id.* at 16-17.

Turning to the intrastate fee, the Court of Appeals concluded that the fee "affects interstate commerce, and thus, implicates the dormant Commerce Clause." 03-1234 Pet. App. 32. The court nonetheless upheld the fee on the theory that it "regulates even-handedly." *Id.* at 34. The court acknowledged petitioners' contention that the fee discriminates against interstate commerce because carriers that travel both intrastate and interstate "invariably will pay a higher per-mile fee than the carrier who operates solely

intrastate," but the court deemed that point insignificant because petitioners "present[ed] no evidence that any trucking firm's route choices are affected by the imposition of the fee." *Id.* at 33-34. The court distinguished this Court's decision in *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987)—which held two unapportioned flat taxes on interstate trucking carriers to be unconstitutional—on the theory that *Scheiner* applies only to taxes for the privilege of doing business in the State, not to "regulatory statutes." 03-1234 Pet. App. 32 n.15.

The Court of Appeals also held that the intrastate fee is not preempted by Section 601 of the FAAAA because there is no evidence that Michigan uses the fees to fund the enforcement of preempted regulations of rates, routes, or services. 03-1234 Pet. App. 21. The court rejected petitioners' argument that the Court of Claims erred by limiting discovery and briefing on that issue. *Id.* at 22-23.

5. The Michigan Supreme Court denied petitioners' application for leave to appeal. 03-1234 Pet. App. 73-75.

DISCUSSION

The $100 fee imposed by Section 478.2(2) of the Michigan statute on carriers that operate solely in interstate commerce is precisely the type of burden on interstate commerce that is prohibited by the Single State Registration System established under 49 U.S.C. 14504. The Michigan Court of Appeals' contrary holding opens a significant loophole in the SSRS, and undermines Congress's efforts to reduce financial and administrative barriers to interstate commerce. Although the separate $100 fee imposed by Section 478.2(1) of the Michigan statute on carriers that engage in at least some point-to-point intrastate transportation in Michigan does not directly implicate the federal statutory scheme, the Court of Appeals' rationale for upholding Section 478.2(1) against dormant Commerce Clause scrutiny is incorrect and difficult to square with decisions of this

Court and the highest courts of other States. If that erroneous rationale is rejected by this Court, however, the validity of the $100 flat fee on interstate carriers that engage in intrastate commerce within Michigan nonetheless presents a difficult and unresolved question that calls for reconciliation of two different strands of this Court's Commerce Clause jurisprudence. Accordingly, the petitions for writs of certiorari in Nos. 03-1234 (Mid-Con) and 03-1230 (American Trucking Associations) should be granted. The petition in No. 03-1250 (Troy Cab) should not be granted because it does not present a substantial question warranting review by this Court.

A. The Court Should Review The Validity Of Michigan's $100 Interstate Fee

By holding that Michigan's $100 fee on carriers that engage only in interstate commerce is not preempted by the SSRS, the Court of Appeals erred on an important question of federal law.

1. Congress enacted the SSRS against the backdrop of this Court's dormant Commerce Clause jurisprudence, which generally prohibits States from discriminating against interstate commerce or otherwise imposing undue burdens on such commerce. See, *e.g.*, *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Congress determined that requirements that motor carriers engaging in interstate commerce must register with a State, or pay fees for that privilege, would impose undue burdens on interstate commerce *unless* they were undertaken pursuant to the SSRS. 49 U.S.C. 14504(b) ("When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden."); 49 U.S.C. 14504(c)(2)(C) ("The charging or collection of any fee under this section that is not in accordance with th[is] fee system * * * shall be deemed to be a burden on interstate commerce.").

Under the SSRS, a motor carrier is required to register with only one State, and only that State may collect fees on behalf of itself and other participating States. 49 U.S.C. 14504(c)(1)(A) and (2)(A)(iii). The fees are allocated among the participating States in which the carrier operates, 49 C.F.R. 367.6(a), and the amount of the fee collected on behalf of any participating State is "*not to exceed $10 per vehicle.*" 49 U.S.C. 14504(c)(2)(B)(iv)(III) (emphasis added).

The $100 fee imposed by Michigan on carriers engaged solely in interstate commerce in Michigan does not satisfy those requirements. Although Michigan complies with the SSRS with respect to vehicles licensed in *other* States, see Mich. Comp. Laws Ann. § 478.7(4), the $100 fee for vehicles licensed in Michigan is ten times the $10 permitted under the SSRS. As the Court of Appeals correctly recognized, the SSRS draws no distinction between fees charged by the State of registration and fees charged by other States. 03-1234 Pet. App. 15. The $10 cap applies to *every* "participating State," 49 U.S.C. 14504(c)(2)(B)(iv)(III), including the one in which a carrier registers. See 03-1234 Pet. App. 15 ("A registration state is simply a participating state in which a motor carrier is registering."); 49 C.F.R. 367.3(a) ("Each motor carrier required to register and pay filing fees must select a single participating State as its registration State."). Because the $100 interstate fee is prohibited by the SSRS, it is preempted.

The Court of Appeals attempted to elide that conclusion by asserting that the SSRS preempts only "registration" fees, as opposed to "regulatory" fees, and that "the $100 interstate fee could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of [state law]." 03-1234 Pet. App. 16. The court based that conclusion on a state court decision distinguishing between "user fee[s]" and "tax[es]" for purposes of a state-law restriction on the imposition of new taxes by units of local gov-

ernment. *Ibid.* (citing *Bolt* v. *Lansing*, 587 N.W.2d 264, 268 (Mich. 1998)). That state-law distinction is irrelevant to the *federal* question here, and nothing in Section 14504 limits the statute's reach to "registration" fees or fees given any other specific label. Nor does anything in the statute exclude fees dubbed "regulatory." Instead, it prohibits "[t]he charging or collection of *any* fee under this section that is not in accordance with" the SSRS. 49 U.S.C. 14504(c)(2)(C) (emphasis added).

In light of that broad and inclusive statutory language, there is no question the interstate fee is covered by Section 14504. The fee is charged to motor carriers licensed in Michigan for every vehicle "registered in this state and operating entirely in interstate commerce." Mich. § 478.2(2). Because the fee is imposed *solely for registering* to participate in interstate commerce, it is hard to characterize it as anything other than a "registration fee," and in any event it is precisely the type of fee Congress sought to regulate. Indeed, Michigan "waives" the lawful $10 interstate "registration fee" for every truck for which the carrier pays the unlawful $100 fee. 03-1234 Pet. App. 16 n.6. As this practice reflects, the only difference between the SSRS fee and the Michigan interstate fee is the amount.

Moreover, when an interstate carrier pays the $100 fee under Section 478.2(2), respondents assign the carrier a decal that it must display as proof of payment. 03-1234 Br. in Opp. App. 10b. That requirement independently violates the SSRS's prohibition against "decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by a motor carrier," 49 C.F.R. 367.5(g); see 49 U.S.C. 14504(c)(2)(B)(iii)—and thereby provides further confirmation that Michigan's interstate fee is the type of fee the SSRS prohibits.

The Court of Appeals erred by relying on repealed ICC regulations, which predated the SSRS, for the proposition

that a State may collect taxes and fees to defray regulatory and law-enforcement costs. 03-1234 Pet. App. 17-18 (citing 49 C.F.R. 1023.104 (1991); 49 C.F.R. 1023.105 (1991)). The question here is not whether a State may impose *any* taxes or fees on motor carriers; instead, the question is whether it may impose fees covered by the SSRS in excess of the amounts permitted by the SSRS. If a State could do so, the SSRS fee caps would be a dead letter.[3]

2. The validity of Michigan's interstate fee warrants this Court's review. Barriers to interstate commerce harm the national economy, contrary to the Framers' intent to create a nationwide "area of trade free from interference by the States." *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 280 (1987) (quoting *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977)). Congress has twice recognized the importance of minimizing barriers to interstate trucking, first when it enacted the bingo card system, and later when it replaced that system with the SSRS. 49 U.S.C. 302(b)(2) (1970); 49 U.S.C. 14504(b) and (c)(2)(C); see *Yellow Transp.*, 537 U.S. at 39-40. The decision below strikes at the heart of Congress's design by sanctioning increased monetary and administrative barriers to the conduct of interstate commerce. This Court has granted certiorari in numerous other cases raising similar interstate commerce concerns, even in the absence of an asserted conflict among appellate courts. See, *e.g.*, *Hillside Dairy, Inc.* v. *Lyons*, 539 U.S. 59 (2003); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997); *General Motors* v. *Tracy*, 519 U.S.

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[3] States remain free to collect other taxes and exactions, such as fuel taxes and tolls, that are related to the extent of a carrier's use of their roads. In contrast to the flat fee at issue here, imposed solely for registration to engage in interstate commerce, those taxes do not fall within the scope of Section 14504. Nor do such charges burden interstate commerce to the extent that flat fees do. See pp. 12-13, 16-17, *infra*.

278 (1997); *Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358 (1991); *Scheiner*, *supra*.

In this case, moreover, there is a division in authority because other courts have correctly rejected efforts to circumvent the fee cap. 03-1234 Pet. 18. Especially apposite is *State ex rel. Sammons Trucking Inc.* v. *Boedecker*, 492 P.2d 919, 919-920 (Mont. 1972), where the Supreme Court of Montana held that a $10 "license fee" was preempted by the bingo card system, which imposed a $5 cap at the time. Respondents contend (03-1234 Br. in Opp. 15) that *Boedecker* is distinguishable because it involved a "*registration* fee" as opposed to a "*regulatory* fee." As explained above (see pp. 7-8, *supra*), 49 U.S.C. 14504 does not draw such a distinction.[4] In any event, the fee imposed by Michigan is as much a registration fee as the one in *Boedecker*. The fee is imposed on carriers that are licensed in Michigan for each vehicle that is "*registered* in the state and operating entirely in interstate commerce." Mich. § 478.2(2) (emphasis added); see p. 8, *supra*.

Thus, the validity of the "regulatory fee"/"registration fee" distinction is part and parcel of the issue on which courts have divided.[5] If the distinction between regulatory and registration fees has no role to play in a proper interpretation of the statute, then it equally provides no basis to distinguish *Boedecker*. Moreover, that illusory distinction serves only to underscore the mischief the decision below could cause. If other States attempted to exempt themselves from the SSRS by invoking the "regulatory fee" label, "commerce among the States would be deterred." *Scheiner*, 483 U.S. at 284. Review in No. 03-1234 is therefore warranted.

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[4] The court in *Boedecker* actually referred to the fee as a "license fee," 492 P.2d at 919, and it did not attach significance to nomenclature.

[5] Courts have also divided on the validity of the distinction in evaluating Commerce Clause claims. See pp. 14-15, *infra*.

3. If the Court grants review, however, it might wish to reformulate the question presented by limiting it to whether the SSRS preempts the fee imposed by Section 478.2(2). Petitioners' question encompasses both whether the SSRS preempts the interstate fee *and* whether the predecessor bingo card system had that effect before it was repealed a decade ago, in 1994. 03-1234 Pet. i. Although a similar analysis applies to both the SSRS and the bingo card system, and an understanding of the bingo card system provides helpful background for understanding the SSRS, the two sets of statutes and regulations are worded differently.[6] The preemptive effect of the bingo card system has some importance to the parties to this case because petitioners have sought a refund of fees paid before 1994 (03-1234 Pet. 7-8), but it does not appear to have any other ongoing significance.

B. The Validity Of Michigan's $100 Intrastate Fee Under The Commerce Clause Also Warrants This Court's Review

Petitioners in No. 03-1230 contend that the fee imposed by Section 478.2(1) of the Michigan statute is unconstitutional as applied to carriers that conduct both interstate and

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[6] Congress authorized the ICC to promulgate standards regarding registration and identification of vehicles operating interstate, and provided that requirements in excess of those standards would constitute an undue burden on interstate commerce. 49 U.S.C. 302(b)(2) (1970). The ICC's standards established the bingo card system described at p. 1, *supra*, and, at the times relevant to this case, specified that the fee for issuance of an identification stamp "shall not exceed $10." 49 C.F.R. 1023.33 (1992). Both the statute and the regulations stressed that they should not "be construed to affect the powers of taxation of the several States." 49 U.S.C. 302(b)(1) (1970); see 49 C.F.R. 1023.104 (1992). Although it might be contended that the latter provisions make the federal preemption issue different under the bingo card system than under the SSRS, the interstate fee was preempted under the bingo card system because it was precisely the type of fee regulated by that system, and it exceeded the lawful amount.

intrastate operations. 03-1230 Pet. i. In our view, that issue also warrants this Court's review.

1. The fee imposed by Section 478.2(1) affects interstate commerce. Interstate carriers that transport even one load between two points in Michigan, as part of their overall interstate operations, are assessed the full $100 intrastate fee. Thus, a truck that is passing through Michigan, in the course of an interstate haul, cannot "top off" by transporting an additional load between two points within the State unless it has paid the $100 fee. Similarly, a truck that has just completed an interstate delivery in Michigan cannot make a haul between two points in Michigan on its return trip unless it has paid the full $100 annual fee. See generally 03-1234 Pet. App. 34. As the Court of Appeals correctly recognized, the $100 fee "affects interstate commerce, and thus, implicates the dormant Commerce Clause." *Id.* at 32; see *Camps Newfound/Owatonna*, 520 U.S. at 573; *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615-617 (1981).

2. Under the Commerce Clause, a state tax is constitutional insofar as it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995) (quoting *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977)). Petitioners contend (03-1230 Pet. 7-17, 20-27) that the fee imposed by Section 478.2(1) violates that test because it is not fairly apportioned and it discriminates against interstate commerce.

Petitioners rely in particular on *Scheiner*, *supra*. See 03-1230 Pet. 8-17. In that case, the Court held that two flat taxes (an identification marker fee and an axle tax) imposed by Pennsylvania on interstate trucking carriers for the privilege of using the Commonwealth's highways were unconstitutional, noting that "[i]f each State imposed flat taxes for

the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." 483 U.S. at 284. The Court explained that the "inevitable effect" of such taxes "is to threaten the free movement of commerce by placing a financial barrier around the State." *Ibid.* The Court distinguished such flat taxes from other exactions, such as fuel taxes, that are fairly apportioned because they are related to the carrier's actual usage of a State's roads, and thereby "maintain state boundaries as a neutral factor in economic decisionmaking." *Id.* at 283.[7]

3. Because the Michigan statute imposes a flat fee of $100 per vehicle for the privilege of doing business within the State, regardless of the amount of intrastate transportation a vehicle actually performs in the State, petitioners contend that its impact is similar to that of the taxes struck down in *Scheiner*. The Michigan Court of Appeals held that *Scheiner* is inapposite on the ground that this case involves what the court characterized as "regulatory statutes," as opposed to "state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state." 03-1234 Pet. App. 32 n.15 (citation omitted). This Court, however, has rejected "the old absolutism" that proscribed "taxation formally levied on interstate commerce." *Jefferson Lines*, 514 U.S. at 183. What matters is "not the formal language of the tax statute but rather its practical effect." *Ibid.* In substance and effect, the distinction drawn by the

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[7] *Scheiner* drew on "[a] line of cases invalidating unapportioned flat taxes." 483 U.S. at 284 n.16. In *Nippert* v. *Richmond*, 327 U.S. 416 (1946), for example, this Court re-affirmed its cases holding flat fees imposed on solicitors or "drummers" (essentially salespersons) acting on behalf of interstate concerns to be unconstitutional. The Court explained that because such taxes bear "no relation to the volume of business done or of returns from it," their burden "will be felt more strongly by the out-of-state itinerant than by the one who confines his movement within the State." *Id.* at 427, 430.

Court of Appeals is meaningless: the intrastate fee is in effect a tax "for the privilege of doing business in the state" because an interstate carrier cannot make intrastate hauls in the State without paying the fee; whether the fee is characterized as "regulatory" has no bearing on its practical effect.

The Court of Appeals' attempt to distinguish *Scheiner* by characterizing the fee as "regulatory" brought it into conflict with the highest courts of New Jersey, Maine, and Massachusetts. Each of those courts expressly rejected the distinction between "regulatory fees" and other sorts of fees or taxes, and each held that a flat tax on the transportation of hazardous waste was unconstitutional under *Scheiner* as a matter of law. *American Trucking Ass'ns* v. *New Jersey*, 852 A.2d 142, 164 (N.J. 2004); *American Trucking Ass'ns* v. *Secretary of State*, 595 A.2d 1014, 1015-1017 (Me. 1991); *American Trucking Ass'ns* v. *Secretary of Admin.*, 613 N.E.2d 95, 99 n.9, 101-103 (Mass. 1993).[8]

In contrast, other courts have credited the erroneous "regulatory fee" distinction relied upon by the Michigan court. See, *e.g.*, *Franks & Son, Inc.* v. *Washington*, 966 P.2d 1232, 1240 (Wash. 1998) (citing cases); cf. *New Jersey*, 852 A.2d at 162-163 (recognizing the conflict and deepening it by "respectfully disagree[ing]" with *Franks & Son* and other cases).

[8] Respondents seek to distinguish those cases on the ground that the fees at issue applied to both intrastate and interstate movements of hazardous waste, whereas the Michigan fee applies only to intrastate shipments. See 03-1230 Br. in Opp. 25. As explained at pp. 16-17, *infra*, that distinction is debatable as applied to interstate trucking carriers. The important point for present purposes is that although the decisions cited in the text held that *Scheiner* applies to state exactions whether they are characterized as "regulatory" fees or some other sort of fee or tax, the Michigan Court of Appeals embraced that very distinction and held *Scheiner* (and *Complete Auto*) inapplicable solely because it regarded Section 478.2(1) as a regulatory statute. See 03-1234 Pet. App. 32 n.15. It is perhaps significant, moreover, that the New Jersey, Maine, and Massachusetts courts did not strike down the fees only as applied to movements solely in interstate commerce, as the logic of respondents' distinction would seem to dictate. See 595 A.2d at 1018 (declaring fee unconstitutional in its entirety); 613 N.E.2d at 105 (same); 852 A.2d at 145, 167 (declaring fee unconstitutional as applied to out-of-state companies).

4. Although the Court of Appeals erred—and departed from decisions of other appellate courts—by relying on the "regulatory fee" distinction, respondents argue (03-1230 Br. in Opp. 17, 22) that *Scheiner* poses no barrier to their collection of the fee for a different reason: that while the taxes at issue in *Scheiner* applied to all trucks traveling within the State, the fee imposed by Section 478.2(1) applies only to trucks undertaking at least some point-to-point intrastate hauls in Michigan, and presents no danger of multiple taxation of those hauls.

That contention finds support in an older line of this Court's cases that subjected flat taxes on transportation companies' intrastate routes to more relaxed scrutiny than taxes on their interstate routes. In *Osborne* v. *Florida*, 164 U.S. 650, 653-654 (1897), for example, this Court assumed that a flat license tax on express companies would have been unconstitutional if applied to companies undertaking solely interstate deliveries, but upheld the tax as applied to companies undertaking both intrastate and interstate deliveries on the theory that the State could tax the intrastate activity. Noting that a "company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce," the Court likewise upheld a partially-flat tax against companies operating railroad sleeping cars that carried both intrastate and interstate passengers in the same cars. *Pullman Co.* v. *Adams*, 189 U.S. 420, 422 (1903).[9]

[9] The Court similarly upheld a flat tax on all vehicles using Illinois' highways on the theory that "each of the [plaintiff] interstate carriers does an intrastate business as well," and "[n]o effort is made to show that * * * the tax is increased by reason of the interstate operations of any appellant." *Bode* v. *Barrett*, 344 U.S. 583, 585 (1953); cf. *City of Chicago* v. *Willett Co.*, 344 U.S. 574, 580 (1953) (upholding flat tax on trucks used to

The continued vitality of those older decisions may be subject to question in light of this Court's decisions in *Complete Auto* and *Scheiner*, which overruled a number of earlier formalist decisions in favor of a more practical framework focusing on the actual effect of a tax. See 430 U.S. at 287-289; 483 U.S. at 292-296. Under this Court's modern precedents, Michigan's fee is constitutional only if it is fairly apportioned, non-discriminatory, and fairly related to the services provided by the State. *Jefferson Lines*, 514 U.S. at 183.[10] *Scheiner* determined that the unapportioned flat taxes at issue in that case were "blatantly discriminatory" and not "even hand[ed]" as applied to out-of-state trucking carriers because they bore no relationship to a carrier's actual use of the State's roads, and thereby "threaten[ed] the free movement of commerce by placing a financial barrier around the State." 483 U.S. at 282, 284, 292; see pp. 12-13, *supra*. Similar concerns may be raised by Michigan's intrastate fee under Section 478.2(1) insofar as it is imposed on carriers engaged in interstate as well as intrastate commerce, because the cost-per-mile incurred by those carriers for engaging in intrastate commerce within Michigan would generally be higher than the cost-per-mile incurred by wholly intrastate carriers for engaging in the same commerce. Cf. *Scheiner*, 483 U.S. at 276, 286, 296-297. The effect could be to place interstate carriers at a competitive disadvantage if they sought to "top off" an interstate load or haul a load between two points in Michigan after completing (or before commencing) an interstate haul. The carrier's interstate transportation could also be adversely affected as a result. The

carry intrastate and interstate loads simultaneously based on the "central and decisive fact" that the business was based in the taxing jurisdiction).

[10] The less demanding test applied to health, safety, and other regulations that impose only "incidental burdens" on interstate commerce likewise requires that a State regulate "evenhandedly." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

record, however, does not fully establish the extent of any such competitive disadvantage or burden on interstate commerce.[11]

5. However the Court might ultimately resolve any tension between *Scheiner* and the *Osborne* line of cases—and the United States has not arrived at a definitive position on that point—the question presented in No. 03-1230 warrants review. That is especially so because the Michigan Court of Appeals erred by resolving that question by characterizing the fees at issue as "regulatory," and because there is a need for this Court's review of the related question of the validity of Michigan's interstate fee under the SSRS. Indeed, Congress's determination in the SSRS that a fee exceeding $10 for interstate hauls would unduly burden interstate commerce suggests that a charge ten times that amount for "topping off" an interstate load warrants review by the Court. As noted above, this Court has repeatedly granted review in dormant Commerce Clause cases even in the absence of a conflict in the lower courts, and in this instance the lower courts are in need of guidance. See pp. 9-10, 14-15, *supra*.

[11] An affidavit submitted on behalf of petitioner USF Holland (then called TNT Holland Motor Express) states that the company's trucks often supplement their interstate loads by either topping off those loads with intrastate loads, or by hauling intrastate loads between interstate loads. 03-1234 Pet. App. 34. That affidavit suggests that in this inherently mobile industry, interstate and intrastate routes may often be undertaken together as part of a carrier's overall interstate operations. The record does not, however, reflect the overall extent to which Michigan's flat fee actually deters out-of-state carriers from compe[illegible]g for intrastate hauls in Michigan, or the extent to which the fee otherwise affects out-of-state carriers disproportionately or burdens interstate commerce. Accordingly, if the Court grants review in No. 03-1230 and articulates a general framework for analyzing fees such as the one imposed by Section 478.2(1) under the Commerce Clause, the Court may find it appropriate then to remand this case to the Michigan courts for application of that framework, including the development of any further factual record that may be necessary.

C. The Petition In No. 03-1250 Does Not Warrant Certiorari

The petition in No. 03-1250 presents the question whether Michigan's intrastate fee, as applied to *all* carriers conducting intrastate hauls—solely intrastate and mixed carriers alike—is preempted by Section 601 of the FAAAA. That statute prohibits a State from enacting or enforcing any law "related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). Congress enacted that provision to end economic regulation of the trucking industry. See *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002). Although Section 601's preemption of economic regulation is broad and important,[12] we do not believe the petition presents a sufficiently substantial issue to warrant review.

In general, the mere levying of a fee is not "related to a price, route, or service of any motor carrier" for purposes of Section 601. 49 U.S.C. 14501(c)(1). In theory, *any* tax or fee might cause a carrier to raise its price or alter its operations, but the same could be said of safety or insurance requirements, or other non-economic regulations, and Congress made clear that it did not intend to sweep so far. See 49 U.S.C. 14501(c)(2) (exempting safety regulation, insurance requirements, and other matters from the scope of Section 601). Without more, therefore, any connection between the assessment of a fee and the prices, rates, or services of a carrier is "too tenuous, remote, or peripheral" to give rise to preemption. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992).

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[12] Congress modeled Section 601 on a similar provision of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 4, 92 Stat. 1708, which this Court has described as "express[ing] a broad pre-emptive purpose." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); see H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 83 (1994).

Petitioners contend (03-1250 Pet. 16-17) that because Michigan imposed the intrastate fee in support of economic regulation before Congress enacted Section 601, it must now repeal that fee along with the other aspects of its economic regulatory regime. There is no apparent basis for this "guilt by association" theory. Michigan would violate Section 601 if, for example, it were to regulate the prices charged by trucking companies, but that does not mean that otherwise lawful fees charged before deregulation may not be charged after deregulation to support government programs that remain lawful, including safety programs. A different case might be presented if the fee substantially exceeded the amount Michigan required to administer lawful programs, but petitioners failed to develop a record below showing that the fee is not related to a permissible purpose.

It might also be argued that although the fee is lawful as applied to carriers that conduct solely intrastate operations in Michigan, it is preempted as applied to interstate carriers because the fee acts as a barrier to entry, and thereby affects "routes" and inhibits interstate operators from offering "services" for intrastate hauls. But none of the petitioners presented that distinct claim in the state courts or in their petitions to this Court. As a result, it is not suitable for review in this case.

CONCLUSION

The petition for a writ of certiorari in No. 03-1234 should be granted, limited to the question whether the fee imposed by Mich. Comp. Laws Ann. § 478.2(2) is preempted by 49 U.S.C. 14504. The petition for a writ of certiorari in No. 03-1230 should be granted. The petition for a writ of certiorari in No. 03-1250 should be denied.

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(2)

No. 03-1230

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC. and
USF HOLLAND, INC.
Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *ET AL.*
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Michigan

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE

The Chamber of Commerce of the United States of America ("the Chamber") hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Consent to the filing of this brief has been obtained from counsel for the petitioners. Counsel for respondents has refused consent.

The Chamber is the world's largest business federation. It represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy and in every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus* briefs in cases involving issues of national concern to American business. The Chamber has participated as *amicus curiae* in several hundred cases before this Court.

The Chamber and its members have a strong interest in this case because the decision of the Michigan Court of Appeals is fundamentally inconsistent with the core constitutional principle of free trade among the States as elaborated in the decisions of this Court. Specifically, the lower court improperly upheld an unapportioned flat tax that is plainly inconsistent with the "internal consistency" standard applied by this Court. To survive such scrutiny, "a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *American Trucking Association, Inc. v. Scheiner*, 483 U.S. 266, 284 (1987) (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)).

The court below declined even to address "internal consistency" on the ground that the Michigan assessment at issue is a "regulatory fee" rather than a "tax." As set forth in the accompanying brief, however, that distinction has no

place in Commerce Clause jurisprudence. The lower court's approach, if adopted more broadly, would re-open an entire area of Commerce Clause jurisprudence long thought settled by *Scheiner*.

Moreover, permitting state courts to elevate form over substance, as in the decision below, poses a distinct danger of state manipulation of the Commerce Clause's requirements. The Michigan court's decision provides state courts a roadmap for evading the Commerce Clause's guarantee of free trade by merely adjusting the line between "fees" and "taxes." Similarly, the lower court's approach would permit state legislators and regulators to erect barriers to trade by ensuring that protectionist measures have characteristics traditionally associated with "fees," including: 1) limited application to specific kinds of businesses subject to regulation by a particular agency and 2) targeted use of funds for specific regulatory expenses.

In short, *amicus* has grave concerns about the implications of the lower court decision, and a great interest in securing expeditious review. This motion for leave to file the attached brief should be granted and the Court should reverse the lower court decision.

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QUESTION PRESENTED

Michigan imposes an annual tax on motor carriers of $100 per vehicle for the privilege of transporting property between points within the State. Though accepting that it "may be" that interstate motor carriers wishing to make such intrastate hauls "invariably will pay a higher per mile fee than the carrier who operates solely intrastate," the Michigan Court of Appeals upheld the tax over petitioners' Commerce Clause challenge. Deepening a split among state courts of last resort, the Michigan Court of Appeals reasoned that (i) this Court's "fair apportionment" requirement does not apply to taxes that are used to fund regulatory activity and (ii) petitioners could not rely on the discriminatory nature of the tax and instead were required to adduce evidence that particular trucking companies' "route choices are affected by imposition of the fee." Against this background, the question presented is:

Whether an unapportioned flat tax like Michigan's can be spared from invalidation under the Commerce Clause on the ground that it is used to pay for regulatory activities and/or because the taxpayer did not adduce evidence quantifying the discriminatory effect of the tax on interstate commerce.

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy and in every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus* briefs in cases involving issues of national concern to American business. The Chamber has participated as *amicus curiae* in several hundred cases before this Court.[1]

The Chamber and its members have a strong interest in this case because the decision of the Michigan Court of Appeals is fundamentally inconsistent with the core constitutional principle of free trade among the States. The federal Constitution was drafted to replace the Articles of Confederation largely to advance that principle, and it is critical to the conduct of American business that the United States remain a free trade zone. As this Court has emphasized, the Commerce Clause "was framed upon the

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[1] Pursuant to Sup. Ct. R. 37.6, the *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus*, its members, and its counsel, contributed monetarily to the preparation or submission of this brief. Counsel for petitioners has consented to the filing of this brief. Because counsel for respondents has refused consent, this brief is accompanied by a motion of *amicus* seeking leave to file.

theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. Seelig*, 294 U.S. 511, 523 (1935).

Facially discriminatory tax burdens – those imposed on interstate but not intrastate commerce – are, of course, unconstitutional. But this Court has recognized that free trade among the States may also be undermined by state laws that "do not allocate tax burdens . . . in a manner that is facially discriminatory." *American Trucking Association, Inc. v. Scheiner*, 483 U.S. 266, 281 (1987). The Court has therefore insisted on "internal consistency" – "a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Id.* at 284 (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)).

The court below characterized the Michigan assessment at issue as a "regulatory fee" rather than a "tax," and refused to apply the "internal consistency" standard. But constitutional principles do not turn on formalistic matters of characterization – whether denominated a "fee" or a "tax," a state levy may burden interstate commerce just the same. Because the lower court decision circumvents this Court's Commerce Clause jurisprudence and sets forth a roadmap for other courts to do the same – raising the specter of balkanization not only in the trucking industry, but throughout the national economy – the Chamber urges grant of the Petition and reversal.

STATEMENT OF THE CASE

This case involves a $100 fee imposed by Michigan on motor carriers transporting property within the State. *See* Michigan Compiled Laws § 478.2(1). The Michigan fee is functionally equivalent to the $36 per axle tax invalidated by

this Court in *Scheiner*. As here, the *Scheiner* tax was facially neutral, applying both to vehicles registered in Pennsylvania and to vehicles registered in other states.

In *Scheiner*, this Court struck down the axle tax, applying the "internal consistency" standard developed in previous Commerce Clause cases from the requirements that state assessments be "fairly apportioned" and "not discriminate against interstate commerce."[2] 483 U.S. at 277. The Court reasoned that the axle tax was not "internally consistent" because "[i]f each state imposed" such a tax, "there is no conceivable doubt that commerce among the States would be deterred." *Id.* at 284. Indeed, while a five-axle truck operating only in Pennsylvania would have paid only one $180 fee, a truck operating in 10 states would have incurred $1,800 in liability if other states enacted the same tax. The Court therefore concluded that "the axle tax has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the States that enacted the measure rather than 'among the several States.'" *Id.* at 286-87.

Below, the Michigan appellate court declined to apply the "internal consistency" test at all. Applying state law principles, the lower court found that the $100 assessment was not a tax, but a "regulatory fee," because "it is a fee imposed for the administration of the MCA [the Michigan Carrier Act], particularly covering costs of enforcing safety regulations." Pet. App. 15a. The lower court held that conclusion dispositive of the federal Commerce Clause issue. In a terse footnote, the court ruled that the internal

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[2] The *Scheiner* Court also invalidated a $25 "marker fee" applicable to out-of-state vehicles, which in-state vehicles were "deemed" to pay through their Pennsylvania registration fee. *See* 483 U.S. at 281-86.

consistency test did not apply because it "is used to analyze the constitutionality of state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, . . . not regulatory statutes." *Id.* at 29a n.16. The court proceeded to apply the more lenient "balancing" test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which pertains to regulations rather than assessments. The court concluded: "[W]e cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways." Pet. App. 31a.

SUMMARY OF ARGUMENT

This case presents an issue of great importance to American business because the decision below unsettles a central precept of dormant Commerce Clause jurisprudence, and in a way that cannot be confined to the circumstances of this case. It is black-letter law that state taxes must be "internally consistent," such that "'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Scheiner*, 483 U.S. at 284 (quoting *Armco*, 467 U.S. at 644)). The lower court circumvented that rule by holding the Michigan assessment at issue to be a "regulatory fee" rather than a "tax." That distinction has no place in Commerce Clause jurisprudence: the burden on interstate commerce does not depend on whether an assessment is a "fee" or a "tax," and there is accordingly no sound basis for applying the internal consistency test only to the latter. If other courts were to adopt the Michigan court's approach, it would lead to nullification of several of this Court's recent dormant Commerce Clause decisions involving motor carriers, as well as decisions dating back many years involving other forms of interstate commerce. The decision below thus threatens not only the trucking industry, but other participants in interstate commerce as well.

In short, the lower court decision appears to flout this Court's *Scheiner* standard by interjecting an irrelevant precondition to its application. Because widespread adoption of that approach would re-open an area of currently settled law, this Court should grant the Petition and reverse the decision below.

REASONS FOR GRANTING THE PETITION

1. Review by this court is warranted because the Michigan court's decision imports an irrelevant and potentially dangerous distinction between "taxes" and "regulatory fees" into the presently straightforward application of the "internal consistency" test. The lower court opinion thereby circumvents – and provides other courts, legislators, and regulators a means to circumvent – the clear rule of *Scheiner*. This Court should not permit that result, but should instead make clear that the internal consistency test applies to "regulatory fees" as well as to "taxes."

The court below concluded, under Michigan law, that "[i]f a fee's purpose is to regulate an industry or service, it can be properly classified as a regulatory fee" rather than a tax. Pet. App. 15a. The Chamber has no quarrel with that conclusion as a matter of Michigan law, and the fee/tax distinction may sometimes be relevant, such as when statutory language or purpose makes the use to which revenue is put determinative.[3] In such circumstances, the courts have explained that "[t]he classic 'regulatory fee' is imposed by an agency upon those subject to its regulation." *San Juan Cellular Telephone Co. v. Public Service Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992) (Breyer, C.J.). It may serve "regulatory purposes directly by, for

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[3] *See, e.g.*, Pet. 15 n.9.

example, deliberately discouraging particular conduct by making it more expensive" or "indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses." *Id.* The classic "tax," by contrast, "is imposed by the legislature upon many, or all, citizens," and "raises money, contributed to a general fund, and spent for the benefit of the entire community." *Id.*

The Chamber submits, however, that this question of classification has never been relevant under the Commerce Clause, and for good reason. First, in practice, the line between "regulatory fees" and "taxes" is far from clear, and has been criticized as analytically unsatisfying. *See generally* Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 Gonz. L. Rev. 335 (2003); Major Cotell and Lieutenant Colonel Jaynes, *Regulatory Fees . . . Or Taxes: Sorting Out The Difference*, 1999 Army Law. 32. Enforcement of the Constitution's guarantee of a free trade zone among the several States should not be made to turn on this uncertain distinction.

More importantly, as the *Scheiner* Court implicitly recognized, whether a particular assessment unduly interferes with interstate commerce has nothing to do with whether it is a "tax" or a "fee." The levy at issue in *Scheiner* certainly had some characteristics of a "fee" – it was, for example, imposed only on truckers, rather than "upon many, or all citizens," and the Court suggested that Pennsylvania may have used the money to defray costs of road repair necessitated by truck traffic. *See Scheiner*, 483 U.S. at 270-71. But the Court ascribed no significance to classification of the assessment, and wasted no time debating it. Instead, the Court applied the "internal consistency test" and held that the levy impermissibly burdened interstate commerce. *See id.* at 286-87. In short, under the *Scheiner* analysis, the axle tax would have offended the Commerce Clause equally

whether it was a tax or a fee. The same is true of the $100 Michigan assessment at issue here.

Academic commentary reinforces the point that whether a state assessment unduly interferes with interstate commerce has nothing to do with whether it is a "tax" or a "fee." "From an economic standpoint," "fees[] and taxes are analytically the same." Jerry Hausman and Howard Shelanski, *Economic Welfare And Telecommunications Regulation: The E-Rate Policy For Universal-Service Subsidies*, 16 Yale J. Reg. 19, 22 n. 59 (1999). Certainly that is true for Commerce Clause purposes under the internal consistency test. As Professor Hellerstein has noted, "the evils that the 'internal consistency' test was designed to combat are the same regardless of whether the unapportioned flat levy is an exercise of the tax power or the regulatory power," and there is therefore no "sound policy basis for distinguishing the 'fee' from the 'tax' cases." Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 157 (1988).[4]

As Professor Hellerstein suggests, it is the failure to satisfy the apportionment requirement – and not the label "tax" or "fee" – that results in a Commerce Clause violation. Indeed, the label applied to an assessment is entirely irrelevant; as a practical matter, an unapportioned levy on motor carriers "penalize[s] some travel within the free trade area" regardless of what it is called. *Scheiner*, 483 U.S. at 284. The "inevitable effect is to threaten the free movement of commerce by placing a financial barrier" around the state imposing the assessment. *Id.* Accordingly, as this Court has held, "any threat of malapportionment" must be assessed by

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[4] *See* Pet. at 10, 14-15 for more detailed discussion of Professor Hellerstein's views.

applying the internal consistency standard. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). The court below avoided that obligation merely by labeling the $100 levy a "fee."

Clearly, permitting state courts to elevate form over substance, as in the decision below, poses a distinct danger of manipulation of the Commerce Clause's requirements. First, state high courts inclined to uphold state money-raising measures (whether "taxes" or "fees") could simply adjust the line between those categories to expand that of "fees" and correspondingly contract that of "taxes." As noted above, the Michigan court addressed the question of classification as a matter of state law, *see* Pet. App. 14a-15a – an approach that would, if generally applied, maximize state courts' ability to determine outcomes under the federal Commerce Clause by re-categorizing assessments as "fees." Second, allowing categorization to control would permit state legislatures and agencies to convert "taxes" to "fees" merely by 1) limiting their application to specific kinds of businesses subject to regulation by a particular agency and 2) using the proceeds to fund specific regulatory expenses. This Court should grant certiorari review now to eliminate the potential for such sleight-of-hand by state courts and lawmakers.

2. Significantly, the decision below would not only nullify *Scheiner* and related decisions of this Court involving motor carriers, but would also eviscerate decades of precedent regarding other areas of interstate commerce. Indeed, as early as 1887, this Court's decision in *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887), adopted an approach to Commerce Clause review of state and local assessments fundamentally inconsistent with the formalistic analysis of the court below. *Robbins* concerned a Tennessee statute authorizing a tax of $10 per week on "drummers" – traveling sales merchants who displayed their goods and took

orders – operating in Shelby County. The County defended the tax on the ground that "no discrimination is made between domestic and foreign drummers – those of Tennessee and those of other states; they are all taxed alike." *Id.* at 497. But unlike the Michigan court below, which upheld the $100 assessment because it "regulates evenhandedly," Pet. App. 29a, this Court struck down the drummer tax.

The *Robbins* Court noted that it was well-established "in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems." 120 U.S. at 494. "The doctrine of freedom of commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject." *Id.* Moreover, in a discussion similar to those in recent decisions establishing the internal consistency requirement, the Court stated that, despite the challenged assessment's facial neutrality, "[i]t would not be difficult . . . to show that . . . [it] is discriminative against the merchants and manufacturers of other states."[5] *Id.* at 498. The Court explained that while local merchants did not need to hire sales agents, merchants from other states "can only sell their goods in Memphis by the employment of drummers." *Id.*

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[5] The same is true here – as the Petition correctly argues, quite apart from the lower court's flat refusal to apply the internal consistency test mandated by this Court's precedents, "the Michigan court erred in failing to recognize the discriminatory nature of the Michigan tax." Pet. at 20. This Court has made clear that unapportioned "flat taxes *necessarily* discriminate against interstate interests." *Id.* at 21. Indeed, in this case, it is undeniable that the Michigan tax imposes a greater per-mile financial burden on trucking companies operating interstate than on those operating solely within Michigan. *See id.* at 22.

As in *Scheiner*, the *Robbins* Court did not discuss whether the Tennessee assessment was a "regulatory fee" or a "tax," although it obviously had some characteristics – such as its narrow application – of a fee. As in *Scheiner* (and as here), if that distinction were important, the assessment could easily have been modified to confer the characteristics of a "fee," for example by limiting its application to specific merchants and depositing the proceeds in a specific fund for some commerce-related purpose. But the effect on interstate commerce would have remained exactly the same. The *Robbins* Court, like *Scheiner*, therefore struck down the assessment without wasting time on questions of categorization.

If the lower court decision according dispositive weight to the fee/tax distinction is allowed to stand, cases as old as *Robbins* will be called into question. Moreover, *Robbins* illustrates that this danger is not limited to the trucking industry alone. Nearly *any* activity – even "drumming" – may be subject to a levy susceptible to characterization as a "regulatory fee." Allowing that denomination to control would, as a practical matter, enable state legislatures and agencies to re-open long-settled law, applicable across industries, by merely adjusting the administrative details of assessment schemes to confer the characteristics of "regulatory fees" rather than "taxes."

Decided one hundred years after *Robbins*, *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), further illustrates this danger. *Tyler Pipe* did not involve a particular industry, but rather a state business and occupations tax that applied to *all* wholesaling within the state of Washington. Although that levy applied equally to both out-of-state and local manufacturers – and thus "appear[ed] nondiscriminatory," *id.* at 248 – the Court nonetheless applied the "internal consistency" test to

invalidate the assessment. The Court pointed out that while the *wholesaling* levy was nondiscriminatory, the state assessment scheme also relieved local manufacturers from paying a *manufacturing* tax on output subject to the wholesale tax. *See id.* at 240. If all states were to apply a similar scheme, the Court concluded, it would be more advantageous to manufacture and sell goods within a state (where only one tax would apply) than to manufacture goods in one state and sell them in others (where a "multiple burden" would result). *See id.* at 247. Interstate commerce would thus be burdened.

That burden would not change were either tax to be restructured as a regulatory fee. The Commerce Clause would be no less offended if, for example, the manufacturing tax scheme were altered so that its proceeds were placed in a special fund and used exclusively to retrain blue-collar workers displaced by global competition. What matters under the Commerce Clause is whether in-state manufacturers are relieved of paying the assessment for the portion of their output subject to the wholesale tax, not the label of the assessment, or the use to which funds are put. Courts applying the Michigan appellate court's approach, however – that the internal consistency test does not apply to regulatory fees – would reach a different result. Again, the lower court decision thus re-opens long-settled issues that potentially affect not merely trucking, but essentially every industry.

The Chamber does not intend to suggest that all state assessments fail the internal consistency test. For example, as this Court explained in *Scheiner*, fuel consumption taxes are directly apportioned to the miles traveled in a particular state, and therefore permissible under the Commerce Clause. *See* 483 U.S. at 283. Other sorts of user fees that would not burden interstate commerce even if applied by all States –

such as the $1 charge for airline passengers at issue in *Evansville-Vanderbaurgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), which was a reasonable approximation of the cost of using the facilities – are likewise permissible. Hellerstein, 87 Mich. L. Rev. at 157-58. But the $100 assessment at issue in this case is not; because Michigan's levy is entirely unapportioned, its burden plainly falls more heavily on carriers operating both intra- and interstate than on those operating only within the state. That places the former at a distinct disadvantage in the Michigan market. Moreover, if other states were to impose such a levy, interstate carriers would be further disadvantaged. Accordingly, Michigan's assessment – like the axle levy invalidated in *Scheiner* – fails the internal consistency test and impermissibly burdens interstate commerce regardless of whether it is called a tax or a fee.

3. The question presented by the Petition is one of particular importance to American business, and one that needs to be addressed without delay. Legal and regulatory certainty are, of course, key ingredients in the successful conduct of business of all kinds. The lower court decision injects uncertainty into an area of law that has been well-settled at least since *Scheiner*. Renewed uncertainty, of course, means renewed litigation. *See* Pet. 26. And the results of that litigation are themselves unpredictable – state courts anxious to uphold state enactments may well adopt the Michigan court's formalistic approach and uphold assessments that impose unlawful burdens on interstate commerce. Both the litigation itself and any adverse decisions that may result will be costly to American business.

For the legal system, renewed uncertainty means inconsistent decisions. Here, as the Petition points out, "inconsistency in the approaches of the lower courts" has already arisen. *Id.* at 20. Several state supreme courts have

properly applied the internal consistency test to invalidate assessments classifiable as "regulatory fees," while the decision below represents a second instance of state courts declining to do so. *Id.* at 20-22. This Court should grant review to eliminate the uncertainty amplified by the decision below.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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MOTION FILED
APR 30 2004

(3)

No. 03-1230

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

MOTION FOR LEAVE TO FILE AND BRIEF OF NATIONAL PRIVATE TRUCK COUNCIL, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE

Pursuant to Rule 37.2(b) of the Rules of this Court, *amici curiae* National Private Truck Council, Inc. ("NPTC"), American Pyrotechnics Association ("APA"), Chlorine Institute ("CI"), Council on Safe Transportation of Hazardous Articles ("COSTHA"), Dangerous Goods Advisory Council ("DGAC"), Institute of Makers of Explosives ("IME"), International Vessel Operators Hazardous Materials Association ("VOHMA"), International Warehouse Logistics Association ("IWLA"), National Propane Gas Association ("NPGA"), National Tank Truck Carriers, Inc. ("NTTC"), Nuclear Energy Institute ("NEI"), Petroleum Marketers Association of America ("PMAA"), Reusable Industrial Packaging Association ("RIPA"), and Truckload Carriers Association ("TCA") (collectively "*amici curiae*"), move that the Court grant leave to file their brief in support of the Petition for Writ of Certiorari. *Amici curiae* sought the consent of Respondents to file the brief, but that consent was denied. Petitioners have granted consent. In support of this Motion, *amici curiae* state as follows:

Amici curiae are industry associations representing a wide range of business interests who, as part of or incidental to their business, ship or transport goods by motor carrier or vessel in interstate commerce. Virtually all of the member companies of these associations either operate truck fleets or ship goods in interstate commerce via motor carrier. Thus, they are subject to State motor carrier taxes and fees imposed by each of those States, directly when they operate their own truck fleets and indirectly when they ship goods by truck. In addition to the Michigan tax at issue in this case, they are subject to a multitude of State taxes and fees applicable to interstate commerce by truck because they individually transport goods by truck in a number of States, and collectively in all 50 States and the District of Columbia.

To the extent that those taxes and fees, like the Michigan tax here, are not properly apportioned by activity in the taxing State, these companies must pay a disproportionate tax solely because of the interstate nature of their operations.

Amici curiae have a legitimate interest in participating in this litigation because they face a concrete and recognizable harm if the Michigan Court of Appeals decision is permitted to stand. Not only does the Michigan tax itself directly harm a number of *amici curiae's* member companies, the decision below offers a road map for other states to adopt similar taxes that impede the free flow of interstate commerce. Thus, *amici curiae* will be subject to additional state taxes and fees simply because they engage in interstate commerce if the decision is allowed to stand.

This Court's rules permit "[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties . . ." Rule 37.1. In this case, *amici curiae's* brief is necessary to bring to the Court's attention the vast practical consequences of the Michigan Court of Appeals decision. The decision below is clearly contrary to this Court's established precedent in *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987), *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and other cases which invalidated unapportioned flat taxes like the Michigan tax. Unless overturned, the decision below will call into question those precedents, and permit other states to impose levies like Michigan's. In addition to paying the Michigan tax, industries represented by *amici curiae's* member companies will be faced with a host of costly tax measures aimed at maximizing State revenues at the expense of interstate commerce. It is essential for this Court to be aware of the broad implications of the decision below, and *amici curiae's* brief seeks to do that.

For these reasons, *amici curiae* request that the Court grant this Motion for Leave to File.

Respectfully submitted,

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QUESTION PRESENTED

Whether Michigan's unapportioned flat tax of $100 per vehicle per year for the privilege of transporting property between points within the State can be spared from invalidation under the Commerce Clause on the ground that it is used to pay for regulatory activities and/or because the taxpayer did not adduce evidence quantifying the discriminatory effect of the tax on interstate commerce.

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INTEREST OF THE *AMICI CURIAE*

Amici curiae here consist of several industry associations representing a wide range of business interests who, as part of or incidental to their business, ship or transport goods by motor carrier or vessel in interstate commerce.[1]

The National Private Truck Council, Inc. ("NPTC") is a Virginia corporation operating as a trade association representing the interests of over 500 companies that operate truck fleets in furtherance of non-transportation primary businesses. The members operate trucks in interstate and intrastate commerce in all 50 states, and they range in size from Fortune 500 companies to smaller local distribution entities. They transport both raw materials and finished goods in a wide variety of businesses including food and beverages, heavy manufacturing, electronics, retail distribution, chemicals and petroleum products, and apparel.

The American Pyrotechnics Association ("APA") is the leading trade association representing the domestic fireworks industry. It has three principle aims: (1) to encourage safety in the design and use of all types of fireworks; (2) to provide industry information and support to its members; and (3) to promote responsible regulation of the fireworks industry. Individual APA members are typically involved in one or more aspects of the fireworks industry: sale and distribution,

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1. As noted in the Motion for Leave to File, counsel for Respondents has not consented to the filing of this brief. Petitioners have consented.

Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or its members, made a monetary contribution to the preparation or submission of this brief.

manufacturing, and public display. As part of their operations, many APA members hold a motor carrier registration, maintain a fleet of commercial motor vehicles, and transport shipments of pyrotechnics in both interstate and intrastate commerce.

The Chlorine Institute, Inc. ("CI") is a 200 plus-member worldwide association of producers, packagers, distributors, users and suppliers of chlorine, sodium and potassium hydroxides, hydrogen chloride in all forms, and sodium hypochlorite. CI's mission is the promotion of safety and the protection of human health and the environment in the manufacture, distribution and use of those chemicals.

The Council on Safe Transportation of Hazardous Articles ("COSTHA") is a not-for-profit organization representing manufacturers, shippers, distributors, carriers, freight forwarders, and container manufacturers involved in the transportation of hazardous materials in interstate, intrastate and foreign commerce. Some of COSTHA's over 100 member companies operate their own truck fleets, while others ship goods via trucks throughout the United States.

The Dangerous Goods Advisory Council ("DGAC") is a non-profit association established in 1974 to promote the safe transportation of dangerous good (known domestically as hazardous materials) by supporting adoption of sound, effective, and uniform safety standards, and by providing extensive training programs. It is comprised of 140 large and medium-sized companies engaged in shipping and transporting dangerous goods, associated businesses, and 19 trade associations representing thousands of air, highway, and rail transporters, chemical producers and distributors, and packaging manufacturers. As a part of or incidental to their business, many of DGAC's members transport or cause to be transported

hazardous materials into or through more than 30,000 jurisdictions in the United States.

The Institute of Makers of Explosives ("IME") is the safety and security association of the commercial explosives industry. The IME represents manufacturers of high explosives and other companies that distribute explosives or provide other related services. Over 2.5 million metric tons of explosives are consumed annually in the United States, of which IME member companies produce over 95 percent. These products are transported in every state in the Union and are distributed worldwide. As a part of or incidental to their business, all of IME's members transport hazardous materials.

The International Vessel Operators Hazardous Materials Association ("VOHMA") is a United States based international association, with a membership comprised of thirty-eight ocean common carriers, operating under the flags of several nations, with the purpose of serving the domestic and international trades in matters pertaining to vessel and intermodal transport of hazardous cargoes. The primary goal of VOHMA is to advocate and promote safe, consistent, and cost-beneficial transport of such cargoes based upon discussion and evaluation of issues impacting maritime operations and interconnecting feeder systems, and to develop consensus positions on all issues which may have a significant impact on transportation safety. Much of the freight that is transported by VOHMA members on the ocean is also transported by truck before or after the water segment.

The International Warehouse Logistics Association ("IWLA") represents 3PLs (third-party logistics providers), public and contract warehouse companies and their suppliers. Since 1891, the IWLA has worked to promote and advance the

logistics outsourcing industry. The 550 IWLA members worldwide ship more than three trillion pounds of goods annually and operate more than 400 million square feet of public and contract warehouse space, providing the most timely and cost-effective global logistics solutions for their customers. As such they are committed to protecting the free flow of goods and services across borders.

The National Propane Gas Association ("NPGA") is the national trade association of the LP-gas (principally propane) industry with a membership of over 3,600 companies, including 39 affiliated state and regional associations representing members in all 50 states. Although the single largest group of NPGA members are retail marketers of propane gas, the membership includes propane producers, transporters and wholesalers, as well as manufacturers and distributors of associated equipment, containers and appliances. Propane gas is used in over 18 million installations nationwide for home and commercial heating and cooking, in agriculture, in industrial processing, and as a clean air alternative engine fuel for both over-the-road vehicles and industrial lift trucks.

National Tank Truck Carriers, Inc. ("NTTC") is a trade association composed of approximately 185 trucking companies which specialize in the nationwide transportation of hazardous materials, hazardous substances and hazardous wastes in cargo tank motor vehicles. NTTC estimates that its members operate approximately 50,000 such vehicles and utilize 45,000 drivers.

The Nuclear Energy Institute ("NEI") is an industry policy organization that fosters the beneficial uses of nuclear technologies worldwide. The NEI's members include leading universities, research laboratories, radiopharmaceutical and radioisotope manufacturers, as well as companies that operate

commercial nuclear power plants, their suppliers, labor unions and others. The NEI's members transport radioactive materials to and from their facilities across the United States on a daily basis. These companies are committed to the safe, efficient transportation of these materials, and oppose state legislative or regulatory actions like the Michigan flat tax that impose an unreasonable burden on interstate commerce.

The Petroleum Marketers Association of America ("PMAA") is a federation of 42 state and regional trade associations representing 8,000 small, independent petroleum marketers. These marketers sell nearly half the gasoline, over 60 percent of the diesel fuel, and approximately 85 percent of the home heating oil consumed in this country annually. PMAA has members in Michigan who must pay the annual fee imposed by the State.

The Reusable Industrial Packaging Association ("RIPA") is the trade association representing North American container reconditioners, manufacturers, and distributors of reusable industrial packaging. Membership in RIPA encompasses over 90% of the industrial packaging reconditioning industry in the United States, many of the leading manufacturers of drums and intermediate bulk containers, as well as many reconditioning and manufacturing companies worldwide. RIPA members design, manufacture, recondition and remanufacture a wide range of reusable industrial packagings for reuse and recycling.

Truckload Carriers Association ("TCA") is the national trade association representing the truckload segment of the trucking industry. Truckload carriers account for approximately 97 percent of the for-hire freight tonnage annually transported

by motor carriers in this country, and a portion of TCA's membership transport hazardous materials.

Virtually all of the member companies of these industry associations either operate truck fleets or ship goods in interstate commerce via motor carrier. The companies are therefore subject to State motor carrier taxes and fees imposed by each of those States, directly when they operate their own truck fleets and indirectly when they ship goods by truck. Because they individually transport goods by truck in a number of States, and collectively in all 50 States and the District of Columbia, they are subject to not only the Michigan tax in question but to a multitude of State taxes and fees applicable to interstate commerce by truck. To the extent that those taxes and fees are not properly apportioned by activity in the taxing State these companies must pay a disproportionate tax solely because of the interstate nature of their operations.

For example, the $100 per vehicle Michigan tax applies regardless of the number of miles operated in the State. If each State and the District of Columbia imposed a similar tax, the *amici* could end up paying $5,100 per vehicle in annual fees while a vehicle that operated solely within Michigan would pay only $100 per year in fees, regardless of the number of miles operated annually by each vehicle.

Moreover, the *amici* have member companies that ship or transport hazardous waste or hazardous materials in some form. As noted by the Petitioners, States have imposed a significant number of additional taxes and fees on transportation of hazardous waste or hazardous materials, *see Petition at 24-25, n.12 and n.13,* and often justify the non-apportioned and discriminatory nature of those fees under their State regulatory power. Nothing in this Court's Commerce Clause opinions,

however, justifies ignoring the requirements for apportionment and non-discrimination by classifying a tax on interstate commerce as a regulatory fee.

Thus, the decision below has consequences far beyond the validity of the Michigan tax. If this Court allows the Michigan Court of Appeals decision to stand, it will provide a road map to other States on how to avoid Commerce Clause limitations on State taxes. Companies that do business in the several States will be without recourse when additional States seek to generate revenue by taxing out-of-state entities.

REASONS FOR GRANTING THE PETITION

SUMMARY OF THE ARGUMENT

The Michigan tax on motor carriers carrying goods to, from or between points in that State, MCL § 478.2(1), is an unapportioned flat tax on companies that carry goods in interstate commerce. As such, it is a violation of this Court's precedents prohibiting such levies, most notably *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987). Such taxes have an adverse economic impact on *amici curiae's* member companies by erecting a financial barrier around Michigan. The tax is therefore unconstitutional because it violates the Commerce Clause of the United States Constitution. This Court's intervention is necessary to overturn a state court decision antithetical to this Court's precedents.

The lower court's error is no more glaring than in its rigid insistence on classifying the Michigan tax as a "regulatory fee" designed to pay for the administration of the Michigan Motor Carrier Act. This Court's established decisions in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) and *Scheiner* require that courts look to the practical effect of state taxes on interstate

commerce. When any type of state fee imposes on out-of-state companies a cost disproportionate to the amount of miles those companies travel in the state, the Commerce Clause is violated. The lower court's tax versus fee distinction is inapplicable in Commerce Clause analysis, and led to an erroneous ruling.

Amici curiae's participation in this case is a testament to the broad implications of the Michigan court's opinion. Many of *amici curiae's* member companies will be hurt by the Michigan tax. Beyond that, however, permitting the lower court's decision to stand will encourage other states to adopt similar measures. *Amici curiae* and other industries would be open to a potential flood of fees and taxes aimed at interstate goods. This Court should grant review of the lower court's decision to prevent other states from following Michigan's example.

The Michigan tax is even more discriminatory than the taxes at issue in the *Scheiner* case. In *Scheiner*, the tax burden fell on a larger category of interstate motor carriers, thus spreading out the harmful effects over a wider range of taxpayers. In this case, the harmful effects fall on a smaller group of carriers, i.e., those interstate carriers who have a limited amount of intrastate trips. Under these circumstances, if the Pennsylvania taxes in *Scheiner* could not pass constitutional muster, surely the Michigan tax must fall.

Unlike the federal government, many states are required to adopt balanced budgets. In the last several years, states have faced a serious budget crunch that has made that task even more difficult. To address these budget problems, states naturally look to impose taxes on out-of-state business interests which have a limited voice in creating state policy. The Michigan tax is a way for the state to tap into an out-of-state revenue source while

protecting instate business. Allowing the decision below to stand will encourage other states to make similar end runs around the Commerce Clause and cause greater economic hardship to *amici curiae* and other interstate business.

Finally, this Court's intervention is needed to provide a greater degree of certainty to Commerce Clause jurisprudence. The Michigan Court of Appeals decision is another in a long line of state policies and court decisions that challenge the Commerce Clause. As noted, states continue to find new ways to tax interstate commerce as a way to increase revenues and protect instate interests. A ruling by this Court repudiating the lower court's decision will provide more certainty in Commerce Clause jurisprudence and discourage state courts and lawmakers from eroding the federal Constitution's guarantee of a free flow of commerce among the states.

ARGUMENT

1. MICHIGAN'S UNAPPORTIONED FLAT TAX CLEARLY VIOLATES *AMERICAN TRUCKING ASSNS., INC. v. SCHEINER*

The Michigan Court of Appeals decision[2] to uphold the Michigan flat tax, MCL § 478.2(1), is yet another in a long line of state actions that, if allowed, would unfairly restrict the ability of thousands of business interests to conduct business freely across state lines. The decision below is clearly contrary to this Court's precedents rejecting such state action as violative of the Federal Constitution's Commerce Clause, most notably in *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266

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2. *Westlake Transportation, Inc. et al. v. Michigan Public Service Comm'n, et al.*, 662 N.W.2d 784 (Mich. Ct. App. 2003) (App. 1a-32a).

(1987).[3] Nothing in *Scheiner* suggests that the approach taken by the Michigan Court of Appeals is constitutionally valid.

In a decision that crystallized a "'quagmire' of judicial responses to specific state tax measures," *id.* at 280 (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1950)), *Scheiner* affirmed precedents invalidating taxes that favor in-state business at the expense of out-of-state business, *Scheiner*, 483 U.S. at 286 (citing with approval *Tyler Pipe Indus. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977)) and rejected decisions upholding such levies, *Scheiner*, 483 U.S. at 292-97.

The Court in *Scheiner* followed its earlier decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), which established a four-part test to determine whether state taxes violate the Commerce Clause.[4] Of particular importance in this case is *Complete Auto Transit's* requirement that a state tax be

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3. *See also Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Tyler Pipe Indus. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 93 (1995).

4. A state tax is unconstitutional unless it "'[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'" *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 93, 183 (1995) (quoting *Complete Auto Transit*, 430 U.S. at 279).

"fairly apportioned." *Id.* at 279. To be considered fairly apportioned, a tax must meet the "internal consistency" test, to wit, "a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Scheiner*, 483 U.S. at 284 (quoting *Armco Inc. v. Hardesty*, 467 U.S. at 644. While *amici* here will forgo a repetition of the cogent and comprehensive analysis of *Complete Auto Transit* and *Scheiner* found in the Petition, *Scheiner's* bottom line is worth repeating: "imposition of the flat taxes for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause." *Id.* at 296.

The only instance in which *Scheiner* anticipated that an unapportioned flat tax may be permissible is that in which collection of the tax is administratively impracticable. *Id.* at 296-97 (Earlier precedents upholding flat taxes are still valid in that "the Commerce Clause does not require the States to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user fee schedule would pose genuine administrative burdens."). But the Court even then recognized that "[t]he administrative machinery of revenue collection *for highways* is now obviously capable of taking into account at least the gross variations in cost per unit of highway usage . . ." *Id.* at 297 (emphasis added). There is no question that Michigan may administer an apportioned motor carrier tax without undue burden. States routinely apportion motor carrier taxes by mileage or by fuel consumption within a State. Thus the Michigan tax on interstate motor carriers falls outside the narrow category of administratively impracticable flat taxes. If anything, the technological advances since *Scheiner* was decided, permitting a greater volume of information sharing at a faster rate, make it

even easier for Michigan to administer an apportioned tax on interstate motor carriers.

The member companies and organizations represented by *amici* here number in the thousands and do business in every state of the Union. They face a steady barrage of actions by state and local taxing authorities across the country seeking to maximize revenues for their individual jurisdictions. The Court's "internal consistency" test is not merely an academic exercise for these companies. It is an essential safeguard against a potential phalanx of individual state levies that would threaten to increase transportation costs virtually without limit. The decision below has serious implications not just in Michigan, but in every other jurisdiction with the power to tax interstate carriers. The Court's intervention is necessary to preserve the principles plainly enunciated in *Scheiner* and repudiate a state court's decision to uphold a state action that impedes the free flow of interstate commerce.

2. THE LOWER COURT'S CATEGORIZATION OF THE MICHIGAN TAX AS A "REGULATORY FEE" IS CONTRARY TO THIS COURT'S MANDATE THAT STATE TAXES BE JUDGED ON THEIR EFFECT ON INTERSTATE COMMERCE

The Michigan Court of Appeals erroneously reasoned that *Complete Auto Transit* and *Scheiner* do not apply in this case because the principles enunciated in those cases apply to "the constitutionality of state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state . . . not regulatory statutes." *Westlake Transportation, Inc. et al. v. Michigan Public Service Comm'n, et al.*, 662 N.W.2d 784, 803 n.15 (Mich. Ct. App. 2003) (App. 29a). This error stemmed from an earlier part of the decision involving the

question of whether the Michigan tax was a registration fee or a regulatory fee for the purposes of deciding whether the fee was preempted by federal law. *Id.* at 790-96 (App. 6a-18a). After an exhaustive look at the historical and current state and federal law governing registration of motor vehicles and the Michigan tax at issue, the court determined that the $100 levy is a "regulatory fee" designed "for the administration of the [Michigan Motor Carrier Act], particularly covering the costs of enforcing safety regulations." *Id.* at 795 (App. 15a). Having made this conclusion in the context of its preemption analysis, the court never wavers in categorizing the tax as a "regulatory fee."

The lower court's rigid insistence on classifying the tax as a "regulatory fee" is contrary to this Court's mandate that, for Commerce Clause purposes, the proper focus should be on the effect the levy has on interstate commerce, and not on the classification assigned by lawmakers. *Scheiner*, 483 U.S. at 294-95 ("In 1977, while we recognized that we had invalidated privilege taxes on instate activity deemed to be part of interstate commerce, we also noted that we had 'moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology. . . . These decisions have considered not the formal language of the tax statute but rather its practical effect. . . .'" (quoting *Complete Auto Transit*, 430 U.S. at 281, 279)).

If the decision below is allowed to stand, any state could avoid Commerce Clause requirements by allocating tax revenues by category to specific spending accounts and ceremoniously dub them "regulatory fees." The effect of such an outcome would be to make the dormant Commerce Clause the Maginot Line of constitutional protection of interstate commerce, easily

circumvented by state taxing authorities. This Court should grant the petition to affirm its precedent in *Scheiner* and *Complete Auto Transit*.

3. THE MICHIGAN TAX HAS AN EVEN GREATER DISCRIMINATORY EFFECT THAN THE TAXES INVOLVED IN *SCHEINER* BECAUSE IT APPLIES SOLELY TO INTRASTATE COMMERCE

The Michigan tax requires any motor carrier carrying goods to, from, or between points in Michigan to pay the $100 levy, whether they engage solely in intrastate trips or do a combination of intrastate and interstate hauls. MCL § 478.2(1). The tax, therefore, applies solely to transportation that has some intrastate component. Interstate trips that merely pass through Michigan and neither drop off nor pick up goods there are immune from the levy. Thus, 100 percent of the revenue generated is derived from trips with some portion of the haul originating or ending in Michigan.

The burden of generating that revenue, therefore, falls on a more limited number of carriers than would be the case if Michigan had taxed all motor carrier transportation, including trips that merely pass through the state. In this light, the example provided by Petitioners — a truck "topping off" its interstate haul with cargo transported between two points within Michigan — is even more troublesome. Those interstate carriers must pay the full $100 fee but travel far less miles annually in Michigan than solely intrastate carriers who pay the same fee. At the same time, interstate hauls that merely pass through the state pay nothing, yet receive some benefit from the regulatory regime purportedly financed by the fee.

The Michigan fee is far more pernicious than the Pennsylvania fees that this court invalidated in *Scheiner*. In this case, an even greater burden is placed on interstate carriers with limited intrastate hauls because the benefit received in relation to the tax paid is far less than the other categories of motor carriers. The disparity of benefit received as a proportion of the fees paid is stark. Imposing a greater cost per mile on interstate trucks is exactly the kind of discrimination prohibited by this Court. *Scheiner*, 483 U.S. at 286 ("In practical effect, since they impose a cost per mile on appellants' trucks that is approximately five times as heavy as the cost per mile borne by local trucks, the taxes are plainly discriminatory."). In this case, the cost per mile to interstate carriers which make limited intrastate hauls is even greater than that in *Scheiner*. Thus, the Michigan tax has an even greater discriminatory effect that the unconstitutional levies imposed by Pennsylvania.

4. STATES CONTINUE TO LOOK FOR OUT OF STATE SOURCES OF REVENUE IN DIFFICULT ECONOMIC TIMES

Despite the Court's unequivocal opinions in *Complete Auto Transit* and *Scheiner*, states continue to impose revenue raising measures that adversely impact interstate commerce. The Petition notes six separate cases in which courts have invalidated flat state taxes or fees. Petition at 11 n.6. *Amici* are aware of over two dozen actions filed by the American Trucking Associations in 15 states challenging flat state taxes and fees imposed on interstate trucking.

The reason for these continued attempts to circumvent the dormant Commerce Clause is clear: states must find new sources of revenue to offset budgetary pressures, especially in hard economic times. The nation's economic climate in the past

several years illustrates the point. The latest *Fiscal Survey of States* issued by the National Governors Association and the National Association of State Budget Officers reported that "states continue to grapple with short-term cyclical and long-term structural problems. Plagued by budget shortfalls for the past three years, states still face uncertainty in the current fiscal year and difficult budgetary choices in the years ahead." *Fiscal Survey of States*, Executive Summary, p. ix (Dec. 2003). Faced with the "familiar" struggle of having to balance their budgets, states have reported the lowest increases of expenditures since 1979, while revenue collections remain stagnant. *Id.*

The most politically expedient way for states to remedy these shortfalls is to impose taxes on entities whose clout with state and local government is limited, i.e., out-of-state business. Taxes such as the Michigan levy are doubly attractive to state lawmakers. Revenue generated disproportionately from interstate commerce only hurts out-of-state interests, while providing an economic benefit to instate businesses. *Scheiner* recognized this. *Scheiner*, 483 U.S. at 284 (the "inevitable effect [of unapportioned flat taxes] is to threaten the free movement of commerce by placing a financial barrier around the State . . .). Local economies thus are benefited at the expense of companies doing interstate business. This situation is plainly contrary to "the central tenet that the Commerce Clause 'by its own force created an area of trade free from interference by the States.'" *Scheiner*, 483 U.S. at 280 (quoting *Boston Stock Exchange*, 429 U.S. at 328). Permitting the decision below to stand will only exacerbate many states' willingness in the face of budgetary emergencies to impose taxes that benefit local economies at the expense of interstate business.

5. THE DECISION BELOW FOSTERS UNCERTAINTY IN COMMERCE CLAUSE JURISPRUDENCE

Seventeen years ago, this Court seemingly solidified a "'quagmire' of judicial responses to specific state tax measures . . ." *Scheiner*, 483 U.S. at 280. Despite the Court's clear language and indisputable reasoning, dormant Commerce Clause jurisprudence continues to be uneven. State taxing authorities continue to search for ways to burden interstate carriers with taxes that benefit their intrastate competitors. Many industries, only some of which are represented by *amici*, are continually confronted with taxes like the one at issue here, and face extensive and costly litigation to defeat state efforts to disproportionately tax interstate commerce.

The Court should grant the Petition to provide a greater degree of certainty in Commerce Clause jurisprudence. To allow the decision below to stand would permit states to declare any tax a "regulatory fee" as an easy way to escape from constitutional scrutiny. The Court must repudiate the Michigan Court of Appeals' erroneous decision and put the Commerce Clause on firm footing for the benefit of the free flow of commerce among the states guaranteed by the United States Constitution.

CONCLUSION

For these reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Nos. 03-1230 and 03-1234

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.
AND USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

MID-CON FREIGHT SYSTEMS, INC., *et al.*,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The Michigan Court Of Appeals

JOINT APPENDIX

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Court of Claims
Docket No. 95-15631-CM

Troy Cab, Inc., *et al.* vs. State of Michigan, *et al.*

January 9, 1995	Complaint
February 21, 1995	Motion to Intervene of American Trucking Associations and TNT Holland Motor Express
April 26, 1995	Order of Reassignment from Judge Brown to Judge Giddings and consolidating the file and all future pleadings in Docket No. 95-15628-CM
May 2, 1995	Case reassigned from Judge Brown to Judge Giddings

State of Michigan
Court of Claims
Docket No. 95-15628-CM

Westlake Transportation, Inc., *et al.* vs.
Michigan Public Service Commission, *et al.*

January 3, 1995	Complaint
February 15, 1995	Amended Complaint
February 21, 1995	Motion to Intervene and Complaint of American Trucking Associations and TNT Holland Motor Express
April 5, 1995	Second Amended Complaint
April 11, 1995	Order granting intervention of American Trucking Associations and TNT Holland Motor Express
May 9, 1995	Amended Complaint of Intervening Plaintiffs American Trucking Associations and TNT Holland Motor Express
June 9, 1995	Order granting class certification
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June 30, 1995	Motion for Summary Disposition filed by Intervening Plaintiffs American Trucking Associations and TNT Holland Motor Express
October 27, 1995	Motion for Summary Disposition filed by Defendants
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December 30, 1998	Order granting Defendants' Motion for Summary Disposition
January 13, 1999	Motion for Reconsideration
March 8, 2000	Order denying Motion for Reconsideration
March 24, 2000	Claim of Appeal to the Michigan Court of Appeals filed by Plaintiffs Westlake Transportation and Troy Cab, *et al.*
March 29, 2000	Claim of Appeal to the Michigan Court of Appeals filed by Intervening Plaintiffs American Trucking Associations and TNT Holland Motor Express

Michigan Court of Appeals/Supreme Court
Court of Appeals Case Nos.
226052; 226122; 226053; 226137
Supreme Court Case Nos. 123562-5; 123566-7

Westlake Transportation, Inc., *et al.* vs.
Michigan Public Service Commission, *et al.*

March 21, 2000	Claim of Appeal filed by Westlake Transportation and Troy Cab, *et al.*
March 27, 2000	Claim of Appeal filed by American Trucking Associations and TNT Holland Motor Express
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April 2, 2001	Brief of Appellee
April 19, 2001	Reply Brief filed by American Trucking Associations and TNT Holland Motor Express
April 23, 2001	Reply Brief filed by Westlake Transportation and Troy Cab, *et al.*
March 11, 2003	Michigan Court of Appeals Opinion – judgment affirmed
April 1, 2003	Applications for Leave to Appeal to the Michigan Supreme Court filed by Westlake Transportation and Troy Cab, *et al.* and American Trucking Associations and TNT Holland Motor Express

January 3, 2004	Orders denying leave to appeal to the Michigan Supreme Court
March 8, 2004	Notice of Docketing Petitions for Writ of Certiorari in U.S. Supreme Court Nos. 03-1230 and 03-1234

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., VAN DER KOOI CARRIERS, INC., PRISM TRUCKING, INC., BESTWAY EXPRESS, INC., GERIG'S TRUCKING & LEASING, INC. and MYRIAH, INC., individually and on behalf of all others similarly situated,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening-Plaintiffs,

v

MICHIGAN PUBLIC SERVICE COMMISSION, its COMMISSIONERS, JOHN G. STRAND, RONALD E. RUSSELL and JOHN L. O'DONNELL, MICHIGAN DEPARTMENT OF TREASURY and its STATE TREASURER and the STATE OF MICHIGAN,

Defendants.

_____/

File No. 95-15628 CM
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AFFIDAVIT OF THOMAS R. LONERGAN

Thomas R. Lonergan, states the following:

1. I am Director of the Motor Carrier Regulation Division, Michigan Public Service Commission, the address being 1048 Pierpont, Suite 4, Lansing, Michigan 48909.

2. The Motor Carrier Regulation Division, pursuant to Article IV of the Motor Carrier Act, collects the fees which plaintiffs allege are unlawful, the intrastate vehicle fee, MCL 478.2(1) and the interstate vehicle fee, MCL 478.2(2). Payment of these fees result in the issuance by the MPSC of a vehicle specific decal which is displayed on the door of each vehicle.

3. The intrastate vehicle fee of $100 is required for all vehicles used in the motor carrier's intrastate operations regardless of what state or Canadian province the vehicle may be commercially registered or licensed by the equivalent of the Michigan Secretary of State. The interstate vehicle fee of $100 is required only if the vehicle is commercially registered and licensed by the Michigan Secretary of State. The vehicle decal is identical in appearance for both intrastate and interstate vehicles (See attachment of photocopy). If the vehicle is used in both intrastate and interstate operations, only one decal and one fee payment is required.

4. I have had prepared, by staff members under my supervision, a review of the fees paid by the plaintiffs in this action to the Michigan Public Service Commission for the calendar years 1992, 1993, 1994 and 1995. This data has been gathered from Commission records as of March

17, 1995. The results of this review are contained in the following paragraphs.

5. Bestway Express, Inc. has held no Michigan intrastate authority during the years 1992-1995. It has paid no $100 vehicle decal fees for intrastate operations during the years 1992-1995. It has paid no $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles.

6. Gerig's Trucking and Leasing, Inc. has held no Michigan intrastate operating authority during the years 1992-1995. It has paid no $100 vehicle decal fees for intrastate operations during the years 1992-1995. It has paid no $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles.

7. Westlake Transportation, Inc. has held Michigan intrastate operating authority for each of the years 1992-1995. It has paid the following amounts for $100 vehicle decal fees for intrastate operation during the years 1992-1995:

1992 –	$100	1994 –	$4,750
1993 –	$3,800	1995 –	$4,900

Westlake has paid no $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles.

8. Van Der Kooi Carriers, Inc. has held Michigan intrastate operating authority for each of the years 1992-1995. It has paid the following amounts for $100 vehicle decal fees for intrastate operation during the years 1992-1995:

1992 –	$900	$1994 –	$900
1993 –	$700	$1995 –	$300

Van Der Kooi has paid no $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles.

9. Prism Trucking, Inc. held no Michigan operating authority in 1992 or 1993. It has held Michigan operating authority since 1994. It has paid the following amounts for $100 vehicle decal fees for intrastate operations during the years 1992-1995.

1992 –	0	1994 –	$200
1993 –	0	1995 –	$500

Prism has paid no $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles.

10. TNT Holland Motor Express, Inc. has held Michigan intrastate operating authority for each of the years 1992-1995. It has paid the following amounts for $100 vehicle decal fees for intrastate operations during the years 1992-1995:

1992 –	$118,272	1994 –	$148,700
1993 –	$135,513	1995 –	$117,220

TNT Holland has paid no $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles.

11. Myriah, Inc. held no Michigan intrastate operating authority in 1992, 1993 or 1994. It acquired Michigan operating authority in January of 1995. It has paid the following amounts for $100 vehicle decal fees for intrastate operations during the years 1992-1995:

1992 –	0	1994 –	0
1993 –	0	1995 –	$500

Myriah has paid $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles in the following amounts:

1992 –	$300	1994 –	$100
1993 –	$100	1995 –	0

12. El Toro Motor Freight, Inc. held no Michigan intrastate operating authority in 1992, 1993 or 1994. It acquired Michigan operating authority in February of 1995. As of March 17, it had paid no $100 intrastate vehicle decal fees for 1995, nor had it paid any in 1992, 1993 or 1994. El Toro has paid $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles in the following amounts:

1992 –	$1,773	1994 –	$1,979
1993 –	$2,860	1995 –	$3,200

13. All of the fees mentioned in the preceding paragraphs #4 through 11 are in increments of $100.00. Partial year (six months or less) decals may also be purchased for $50.00 In the preceding paragraphs, some revenue amounts are in irregular amounts. These dollar amounts were extracted from state accounting records but apparently include occasional errors, either in recording information or in posting revenue to the wrong accounts.

14. A motor carrier does have a choice as to the state in which it may wish to commercially register its vehicles. For example, some motor carriers based in Michigan may register their trucks in Illinois. But, in any event, an individual vehicle will receive license plates from only one State. Therefore, it would not be possible for an individual truck to pay multiple fees if the fee is applied based upon the state of vehicle licensure.

15. In the fiscal year 1993-94, the decal fee revenue collected pursuant to MCL sections 478.2(1) and 478.2(2) was $3.65 million. Total motor carrier fee revenue collected by the MPSC from all sources was $6.25 million, including $2.1 million collected from the $10.00 interstate vehicle fee, section 478.7(4). The distribution of this revenue is via appropriations by the Michigan legislature to the Department of Commerce, the Public Service Commission, the Michigan State Police and the Michigan Truck Safety Commission in the following amounts for fiscal 1993-94:

State Police	$2.63 million
Department of Commerce	$566 thousand
Public Service Commission	$2.16 million
Truck Safety Commission	$766 thousand

These revenues are utilized by the respective agencies for economic, insurance, and safety regulation of the Michigan trucking industry, safety education programs, and for enforcement of both the Michigan Motor Carrier Act and the Michigan Motor Carrier Safety Act, MCL 480.11 et al. Examples of safety enforcement include traffic enforcement such as speeding, vehicle inspections, alcohol and drug testing enforcement, hazardous materials, oversize and overweight enforcement and driver log book enforcement. The Motor Carrier Division of the State Police was, until 1982, a part of the Public Service Commission. When this division was transferred to the State Police by Executive Order 1982-1, funding support from PSC revenues sources was continued to the present time. The safety regulation responsibilities are applied equally to intrastate and interstate motor carriers while the economic regulation responsibilities apply primarily to intrastate

motor carriers, although the MPSC does have responsibility for insurance compliance by interstate motor carriers based in Michigan. It has been estimated that of the funds provided to the State Police prior to January 1, 1995, in excess of 90% has been used for safety enforcement and less than 10% for economic regulatory enforcement. In the Motor Carrier Regulation Division of the PSC prior to January 1, 1995, approximately 43% was spent for economic regulation, 25% for safety and insurance compliance and 32% for revenue collection. After January 1, 1995, this expenditure pattern has begun changing as some economic regulation will phase out. The result will be a reallocation of funding to safety purposes or a fee reduction if implemented by the legislature.

16. Paragraph #9 of Van Der Kooi's affidavit filed with Westlake's motion for class certification (and in similar statements in each of the other six affidavits) suggests that Michigan's interstate fee system could be adopted nationwide resulting in multiple fees. Note that the Michigan's interstate fee system is only applied to vehicles commercially licensed in Michigan. Even if every state adopted the same system, an individual motor carrier would pay the fee only once, in the state in which it voluntarily becomes commercially licensed.

17. Paragraph #6 of Myriah's and El Toro's affidavits indicates that they paid $100 interstate decal fees for each of its vehicles used exclusively for interstate transportation. Myriah and El Toro could have avoided those fees by registering its vehicles in another state.

/s/ Thomas R. Lonergan
Thomas R. Lonergan

Subscribed and sworn to before me
this 23rd day of March, 1995.

/s/ Carol Ann Dane
Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

WESTLAKE
TRANSPORTATION, INC.,
et al,

Plaintiffs,

v

MICHIGAN PUBLIC
SERVICE COMMISSION,
et al,

Defendants. /

File No. 95-15628 CM
Hon. James R. Giddings

TROY CAB, INC., et al,

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MICHIGAN PUBLIC
SERVICE COMMISSION,
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File No. 94-15631 CM
Hon. James R. Giddings

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AFFIDAVIT OF THOMAS R. LONERGAN

Thomas R. Lonergan, being first duly sworn, deposes and says as follows:

1. Affiant is the Director of the Motor Carrier Regulation Division of the Public Service Commission, Michigan Department of Commerce, and has held this position for approximately nine years.

MOTOR CARRIER ACT

2. The Motor Carrier Regulation Division (MCRD) is responsible for assisting the Commission in the administration of the Michigan Motor Carrier Act, 1933 PA 254, as amended, MCL 475.1, et *seq*, the title to which begins as follows:

"AN ACT *to promote safety upon and conserve the use of public highways* of the state; . . . ". (Emphasis added).

3. The titled purpose of promoting safety upon and conserving the use of public highways is restated in the purpose and policy section of the Act, MCL 475.2, which in pertinent part states as follows:

> "It is hereby declared to be the purpose and policy of the Legislature in enacting this law to confer upon the Commission the power and authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to: . . . (b) *protect and conserve the highways and protect the safety and welfare of the travelling and shipping public in their use of the highways*;. . . . " (emphasis added)

4. The motor carrier transportation industry provides a public service, but also increases the risk of harm to the traveling public and damage to the public highways. The transportation by motor vehicle for hire is a commercial enterprise for profit which utilizes the public highways in conjunction with the travelling public. Since motor vehicles for-hire increase the risk of harm to those using the highways as well as the cost of maintaining those highways, the Motor Carrier Act requires motor carriers to pay their share of the costs associated with promoting safety upon and conserving the public highways through regulating motor carriers' use of the highways and assessing certain privilege fees and taxes.

5. The title to the Motor Carrier Act provides for the collection of fees and taxes from motor carriers to promote the highway safety and conservation purposes of the Motor Carrier Act as follows:

> " . . . To provide for the levy and collection of certain privilege fees and taxes for such carriers *for such purposes* and the disposition of such fees and taxes; . . . ". (Emphasis added).

6. The Motor Carrier Act, also provides for the regulation of price, route and service of motor carriers for-hire. The title of the act in pertinent part states as follows:

> " . . . to give the Commission jurisdiction and authority to fix, alter, regulate and determine rates, fares, charges, classifications, and practices of common motor carriers for such purposes; to require filing with the Commission of rates, fares and charges of contract carriers and to authorize the Commission to prescribe minimum rates, fares, and charges, and to require the observance thereof; to prevent unjust discrimination; . . . "

7. The regulation relating to price, route and service are also provided for in the purpose and policy section of the act, MCL 475.2 which in pertinent part states as follows:

> "(d) Meet the needs of motor carriers, shippers, or receivers, and consumers; (e) allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; . . . (i) prevent unjust discrimination; . . . (k) provide and maintain service to small communities and small

> shippers; . . . (m) promote entrepreneurship in the motor carrier industry by allowing greater contract carrier economic and entry flexibility; . . . "

The Motor Carrier Act was also designed to stabilize the industry by limiting entry and regulating rates, routes and services so as to assure quality transportation services to the public, and promote safety upon and conservation of the public highways. Since January 1, 1995 the Motor Carrier Division of the Michigan Public Service Commission has not enforced any of the laws or regulations relating to the price, route or service of a motor carrier.

8. A partial legislative history of Michigan motor carrier regulation includes the following significant events:

a. 1933 Passage of P.A. 254, Michigan Motor Carrier Act

b. 1963 Passage of P.A. 181 Motor Carrier Safety Act, jurisdiction assigned to the Public Service Commission. No funding provided.

c. 1966 PA 162 amends Motor Carrier Act to repeal levy of weight-distance tax on motor carriers, substitutes per vehicle annual fee of $50.00 and application fee of $20.00

d. 1982 PA 354 amends the Motor Carrier Act. Partial deregulation, collective ratemaking authorized, fee increases to improve regulation and enforcement:

application fee	$20 to $100
annual decal fee	$50 to $100

e. 1982 Executive Order 1982-1 transfers jurisdiction of Motor Carrier Safety Act and the PSC enforcement division to the State Police. Funding continues to be provided from PSC generated motor carrier fees.

f. 1988 PA 347 requires interstate motor carriers to register ICC authority and pay $10 per vehicle fee. To be effective 1/1/90.

g. 1991 Public Law 102-240 "Intermodal Surface Transportation Efficiency Act of 1991" mandates state participation in the "Single State Registration System" to be effective 1/1/94.

h. 1993 PA 352 amends to Motor Carrier Act to further deregulate; requires PSC to develop a safety rating system.

i. 1994 Public Law 103-305 "Federal Aviation Administration Authorization Act of 1994." Sec 601 preempts certain state and local authority for economic regulation of motor carriers.

INTERSTATE VERSUS INTRASTATE COMMERCE

9. Regulation of the motor carrier industry in this nation has traditionally involved a dual system of federal and state regulation. The Interstate Commerce Commission regulates interstate motor carrier transportation while state regulation of intrastate commerce has been preserved. Pursuant to 49 USC § 10521 (***Exhibit A***) the general jurisdiction of the Interstate Commerce Commission over transportation by motor carriers is defined, and thus leaves the states to regulate intrastate operations involving a pickup and delivery of property in the same state without a prior or subsequent movement through another state.

10. Historically, the Interstate Commerce Commission has regulated motor carriers operating in interstate commerce in a similar fashion to the way the Michigan Public Service Commission has regulated motor carriers operating in intrastate commerce. Certificates of authority to conduct operations, together with tariffs covering rates,

routes and services have been provided by the ICC for interstate operations and the MPSC for intrastate operations. The Michigan Motor Carrier Act requires interstate carriers to comply with the Michigan Motor Carrier Act, except to the extent the Act is inconsistent with or contravenes federal law. See MCL 476.12, MCL 477.10 and MCL 478.7. The MPSC regulates the for-hire transportation of property by motor carriers which move wholly within the state (intrastate). If the property to be transported is to be moved by the owner of the property in motor vehicles owned or leased by the owner of the property, then the movement is private carriage, not regulated by the MPSC or the ICC. Otherwise, the for-hire transportation of property intrastate requires a motor carrier to obtain MPSC operating authority.

11. According to the 1993-1994 NARUC compilation of transportation regulatory policy (***Exhibit B***) 45 states and U.S. Territories have some form of regulation of common carriers. The vast majority of these states and territories also regulate insurance (45 states), safety (33 states) as well as the registration of interstate carriers (37 states). Thirty-nine states (39) also assess a fee for intrastate registration of motor carrier operations. Thirty-two (32) states or territories (32) utilize an identification device for vehicles such as a decal or stamp. A few states also regulate private carriers.

MOTOR CARRIER FEE SYSTEM

12. Article 4 of the Michigan Motor Carrier Act, MCL 478.1 through MCL 478.8 provides for the collection of certain fees referred to in the title of the Act to carry out the Act's purposes. Of all the motor carrier fees collected, approximately half go to the Department of State Police for safety enforcement of the motor carrier industry. The

remainder is used by the MPSC and the Michigan Department of Commerce for the administration of the Motor Carrier Act which includes enforcement of safety, financial fitness and insurance requirements for motor carriers.

13. The intrastate authority application fee at MCL 478.1 is paid by an applicant for an *intrastate* MPSC certificate. An interstate motor carrier would not pay this fee. The fee is $100 for the original application and $50.00 for the annual renewal. This fee amount has remained the same since 1982. Prior to the 1982 amendments to the act, the application fee was $20.00 and the renewal fee $10.00. The application process involves several steps including checking the completeness of the application, performing a safety review of the applicant, publishing a notice of the application in the bulletin, and preparing a file for Commission consideration. In the event of a protest, a hearing is also scheduled. Prior to January 1, 1995, oral testimony or written affidavits were also required regarding the public need for the services. The renewal requires a vehicle update and proof of insurance along with payment of fees. The intrastate application fees and renewal fees generate approximately $200,000 per year in revenue which is merged with other motor carrier fee revenues and appropriated to the Public Service Commission, Department of Commerce and Michigan State Police. Any unexpended balances are deposited in the Michigan Transportation Fund at the end of the fiscal year. In fiscal year 1993-94, the PSC collected $224,000 in PSC application fees.

14. A motor carrier obtaining intrastate authority must also determine the vehicles which it will assign to intrastate transportation. A list of the equipment providing intrastate services is furnished with the original application or renewal application. An example of such a

listing is attached as ***Exhibit E***. A carrier also pays the $100 annual fee relating to his intrastate authority for each vehicle pursuant to MCL 478.2(1). The carrier itself selects which self-propelled power units and how many units, relate to provision of intrastate authority and makes the requisite payment relating to said vehicles. The MPSC Staff does not determine how many units, or which units, are used for intrastate authority. This is a matter solely determined by each carrier a good faith basis, without review by the MPSC Staff. Each carrier makes a determination concerning what portion of their vehicle fleet should be apportioned or allocable to Michigan intrastate authority based upon his own operations, business determinations, and factors which are relevant to his own business circumstances or situation. Neither the MPSC Staff nor the MPSC have undertaken any complaint or other enforcement action relating to second guessing or challenging the vehicle fees paid by a carrier utilizing each carrier's own judgment as to the portion of its fleet to be used for intrastate operations in Michigan based upon its own business circumstances.

15. The intrastate annual vehicle decal fee found at MCL 478.2(1) is paid after an intrastate motor carrier has obtained an MPSC motor carrier certificate. Before the carrier commences operations under its certificate, it must purchase a decal for each power unit at a fee of $100 each. This decal identifies that the carrier has paid its fee and is affixed to the door of the vehicle. A six-month decal is also available after July 1 for $50.00. Each calendar year the decals must be replaced. A household goods carrier only pays a $50.00 annual fee. These fees have remained the same since 1982. Prior to that time the fee was $50.00 except for household goods carriers which paid $20.00. Prior to 1966, the Commission collected a weight/distance tax rather than a per vehicle fee. This fee, MCL 478.2(1),

is the largest source of revenue for the Public Service Commission motor carrier regulation functions and also supports the State Police Motor Carrier Division, which until 1982 was part of the PSC. These fees support State Police enforcement of the Motor Carrier Act, Motor Carrier Safety Act, size and weight limitations, enforcement of the Vehicle Code and other laws governing commercial motor vehicles and motor carriers. In calendar year 1994, the PSC collected approximately $2,905,000 in intrastate vehicle decal fees.

16. The interstate annual vehicle decal fee found at MCL 478.2(2) is paid by an interstate motor carrier only on vehicles registered and plated through the Michigan Secretary of State. The Commission has always interpreted vehicles "registered in this state" as meaning registered and license plated with the Secretary of State. An interstate carrier which registers its vehicles in any other state or province does not pay this fee. The fee is $100.00 per calendar year per vehicle or $50.00 after July 1. A decal identical to the intrastate decal is issued and affixed to the door of the vehicle. This fee has remained the same since 1982. It was $50.00 from 1966 to 1982. These fees amounted to approximately $751,000 in 1994. The revenue from these fees is combined with other motor carrier fee revenue and appropriated by the Legislature for expenditure by the PSC and the State Police Motor Carrier Division. These fees support enforcement of the Motor Carrier Act, Motor Carrier Safety Act, Michigan Vehicle Code, size and weight regulation, and other laws governing commercial vehicles and motor carriers. Since 1966, the fees paid by intrastate PSC regulated motor carriers and interstate motor carriers commercially registered in Michigan have been identical. The fees levied on interstate motor carrier vehicles commercially registered in other states are covered by MCL 478.7 and are a

maximum of $10.00. For fiscal year 1993-1994 the Commission collected $2,235,000 pursuant to MCL 478.7(4).

17. The federal single state system of registration, providing for a $10 fee for registering federal authority in each state, is established under the federal sphere of regulation of interstate transportation under the Interstate Commerce Act of 1980 as amended, as the exercise of the federal portion of jurisdiction under the dual nature of state/federal regulation of motor carrier transportation. The separate intrastate fees collected by Michigan and most other states relate to intrastate transportation and the exercise of the states powers relative to the state portion of the dual federal-state jurisdictional system. The intrastate fees collected by the state should not be confused with the single state registration system adopted for the separate federal system.

18. The annual renewal fee collections (478.1) as well as the various annual vehicle fees collections (478.2(1), 478.2(2) and 478.7) for the plaintiffs as well as a sample of large motor carriers that operate in Michigan for the years 1993, 1994 and 1995 are attached as ***Exhibit C***. This data demonstrates the diversity of types and amounts of fees paid by the plaintiffs and others. The motor carriers make various business decisions that impact the amount of fees. These decisions involve the location of the principal place of business, the state in which the carrier chooses to register its vehicles and whether or not the carrier has obtained an intrastate certificate.

19. The Legislature expected that motor carriers with a close nexus to Michigan (vehicles operating in intrastate commerce with MPSC authority or vehicles plated in Michigan) would pay fees for the administration of the Motor Carrier Act, the purposes of which are to

promote safety, conserve highways and economically regulate the industry. Michigan motor carrier fees under MCL 478.1 and MCL 478.2 are not paid by motor carriers engaged in interstate commerce on vehicles plated in another state. The rationale for charging interstate vehicles plated in Michigan a fee, under MCL 478.2(2), and not charging interstate vehicles plated in another state is a fee that vehicles which are license plated in Michigan are based in Michigan, and therefore have a greater utilization of the highways and services in Michigan than do vehicles plated in another state. Different states collect various fees and taxes from motor carriers in different combinations and in significantly different amounts. See ***Exhibit B*** for a chart which shows fuel taxes, truck and trailer registration and other fees (including motor carrier fees such as Michigan's decal fees). Many of these fees apply to both intrastate and interstate motor carriers and motor vehicles.

SINGLE STATE REGISTRATION

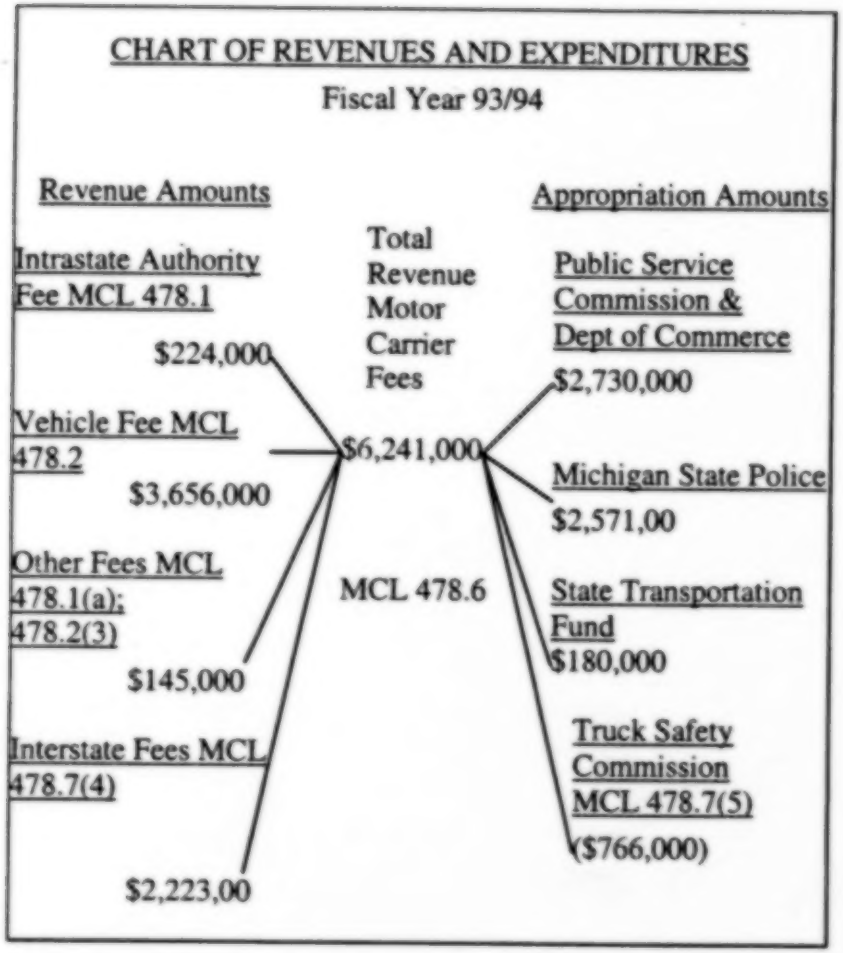
20. The Single State Registration system, to which the $10 fee applies, relates to filing of interstate ICC authority and proof of insurance with each state for each vehicle operating in interstate commerce to enable states to enforce ICC requirements. It does *not* relate to the state registration requirements for registration, authorities, license plates, etc. which may be applicable to intrastate operations or those interstate vehicles or operations having a close nexus to the state. The ICC has none of its own police officers or enforcement people to enforce ICC requisite requirements and relies on the states for this purpose under the SSRS system. Congress allows the states to require motor carriers operating with interstate authority to register their ICC certificate or permit before

commencing operations within that state and has specifically found that such registration is not an unreasonable burden on transportation when registration is completed under the standards of the single-state-registration system found at 49 USC § 11506. Under the single state registration system, an interstate motor carrier is required to register annually with only one state by filing its ICC certificate or permit and proof of insurance along with the payment of a fee for each participating state not to exceed $10.00 per vehicle which the motor carrier admits will operate in each participating state.

21. Michigan is a participating state in the single state registration system and pursuant to the Michigan Motor Carrier Act, MCL 478.7(4), levies an annual fee of $10.00 or less on each interstate motor carrier vehicle operated in Michigan. In the fiscal year 1993 to 1994 Michigan collected approximately $2,223,000 in interstate registration fees under MCL 478.7(4) and consistent with the requirements of MCL 478.7(5), $766,000 of those fees collected were deposited with the Truck Safety Fund and utilized for safety education programs for motor carriers and Michigan State Police safety and enforcement purposes.

REVENUE COLLECTED FROM MOTOR CARRIER FEES

22. The following chart shows revenue collected and expenses for fiscal year 1993-1994 for motor carrier fee under the Michigan Motor Carrier Act, 1933 PA 254:



As is evident from the above chart, the total amount of regulatory fees collected under the Motor Carrier Act are closely matched to the State of Michigan's cost of regulating motor carriers to carry out the purpose of the Act.

APPROPRIATIONS FOR SAFETY

23. The safety purposes of the Michigan Motor Carrier Act, 1933 PA 254, are carried out in part by the PSC which administers the following safety functions:

a. A MPSC certificate is issued to a motor carrier only after a safety review consistent with requirements set by the Commission in Order T-1281.

b. A certificate may be revoked or suspended for unsafe operations.

c. Regulatory compliance with state and federal vehicle and driver regulations through the certificate process.

d. Regulatory compliance with insurance coverage requirements.

24. Prior to 1982, the Michigan Public Service Commission utilized its own enforcement division to carry out safety inspections, traffic enforcement, safety audits and the operation of scale sites for motor carriers. In 1982, Governor Milliken transferred by Executive Order 1982-1, the PSC Enforcement Division to the Department of State Police along with the responsibility and funding for enforcement of the Motor Carrier Safety Act, 1963 PA 181. Under the Motor Carrier Safety Act, the Motor Carrier Division of the State Police is responsible for the following safety functions:

a. Vehicle requirements such as brakes, load securement, inspections, etc. are specified and enforced.

b. Driver requirements such as hours of service, licensing, medical certificates, etc. are specified and enforced.

c. Drug and alcohol testing requirements are enforced.

d. Safety inspections and audits are conducted.

e. Regulates movement of hazardous materials.

25. Approximately half of all Michigan motor carriers fees collected are appropriated by the Legislature to the Motor Carrier Division of the Department of State Police for safety enforcement and inspections of motor carrier vehicles. Title XII of Public Law 99-570, 49 CFR Federal Motor Carrier Safety Regulations are administered by the Federal Highway Administration of the U.S. Department of Transportation. Through agreements with the State of Michigan, the Motor Carrier Division of the State Police also enforces the federal requirements which in pertinent part include the following:

a. Requires uniform commercial drivers license.

b. Specifies vehicle and driver requirements.

c. Establishes drug and alcohol testing requirements.

d. Specifies accident reporting requirements.

e. Regulates transportation of hazardous materials.

f. Establishes a motor carrier safety rating system.

PREEMPTION OF PRICES, ROUTES AND SERVICE

26. On August 23, 1994, President Clinton signed into law the Federal Aviation Administration Authorization Act of 1994 (FAAA Act), amending Title 49 USC § 11501, which took effect on January 1, 1995.

27. On September 8, 1994, the Michigan Public Service Commission, in direct response to the enactment of 49 USC § 11501(h) issued an "Order and Notice of Hearing Commencing Contested Case Proceedings for An Order Regarding Federal Preemption of State Motor Carrier Regulation", to examine the effect of 49 USC § 11501(h) on the Michigan Motor Carrier Act and Rules. The proceeding was conducted as a contested case pursuant to the Administrative Procedures Act of 1969 and the Commission's Rules of Practice and Procedure.

28. In its January 11, 1995 Opinion and Order the Commission recognized that only the Legislature had the authority to revise the Michigan Motor Carrier Act:

> . . . This order is therefore intended solely to provide guidance regarding how the Commission expects intrastate motor carrier regulation to operate in Michigan after January 1, 1995. Thus, interested parties retain the right to request a different interpretation from the Commission, the Courts, and the Legislature regarding the effect of Section 601 on the issues addressed below.

29. The Commission found in its January 11, 1995 Opinion and Order that section 601(h) of the FAAA Act, 49 USC § 11501(h) specifically provides for the preemption of state economic regulation of motor carriers engaged in the intrastate transportation of property to the extent such regulation is related to a price, route, or service.

30. The Commission found in its January 11, 1995 Opinion and Order that Congress limited the preemptive reach of Section 601 under the heading "Matters not Covered" found at 49 USC § 11501(h)(2). There Congress specifically stated as follows:

> (1) – (a) Shall not restrict the safety regulatory authority of a state with respect to motor vehicles, the authority of the state to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a state to regulate motor carriers with regard to minimal amounts of financial responsibility relating to insurance requirements and self insurance authorization; and (b) does not apply to the transportation of household goods.

31. Pursuant to the Commission's January 11, 1995 Order in MPSC Case T-1273, applications for intrastate authority have been issued for 1995 on a state-wide basis, namely, a motor carrier wishing to perform intrastate service in Michigan makes application for authority for the entire state of Michigan, and pays the requisite application fee. The application then is subject to review for safety, fitness, insurance requirements, and other matters to ensure that the carrier may be authorized to perform services in Michigan. Due to the adoption of Section 601 of the FAAA, effective January 1, 1995, authority is no longer issued relative to any specific rate, route, or service, except for household goods carriers. A copy of the statewide application for intrastate authority is attached as ***Exhibit D***. The safety review consists of an analysis of Part II of the Application, Safety Information, as well as any supplemental data that may be requested; U.S.D.O.T. records

regarding safety ratings; and Michigan State Police files regarding vehicle inspections, violations found and citations issued. From those materials a safety profile is developed in accordance with the Commission's order in Docket T-1281.

32. Congress also placed beyond the preemptive reach of Section 601, in an optional format, the continuation of certain standard state transportation practices with regard to uniform cargo liability rules, uniform bills of lading, uniform cargo credit rules and anti-trust immunity for joint line rates or routes, classifications and mileage guides if compliance with state law was no more burdensome than compliance with federal law covering the same subject and if requested by a carrier.

33. In its January 11, 1995 Opinion and Order, the Commission noted that the most important issue to be decided was whether Section 601 preempts the MMCA and rules, either in their entirety or, with respect to only those regulatory provisions concerning price, route and service, and concluded as follows:

> Despite some parties' assertions to the contrary, the wording of [s]ection 601 stops far short of precluding state regulation of all aspects of motor carriage. For example, its heading reads "Preemption of State Economic Regulation of Motor Carriers." This implies that, of the range of areas presently covered by state regulation, economic regulation (rather than regulation of safety, fitness, insurance, etc.) was singled out by Congress for at least partial preemption. Such an implication is further supported by the "General Rule" set forth in [s]ection 601(h)(1), which states only that states "may not enact or enforce a law, regulation, or other provision . . . *related to a*

price, route, or service" of any for-hire or private motor carrier. (Emphasis added.) Issues involving prices, routes, and services have long been considered by the motor carrier industry to fall within the definition of economic regulation.

Furthermore, [s]ection 601 lists several exceptions to Congress' preemption of economic regulation. Foremost among these is the statement that [s]ection 601:

> "[S]hall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." [Section 601(h)(2)(A).]

Next, [s]ection 601 states that its preemptive effect "does not apply to the transportation of household goods." [Section 601(h)(2)(B).] Finally, under the heading "State Standard Transportation Practices," [s]ection 601 indicates that it "shall not affect any authority of a State . . . to enact or enforce" a law, rule, or regulation related to uniform cargo liability rules, uniform bills of lading or receipts for property being transported, uniform cargo credit rules, or antitrust immunity for joint-line rates or routes, classifications, and mileage guides. [Section 601(h)(3)(A).] However, it further provides that continuing regulatory authority over these standard transportation practices (1) will only arise where the law, rule, or regulation "is no more

burdensome" than compliance with federal laws covering the same issue and corresponding regulations issued by either the ICC or the U.S. Secretary of Transportation, and (2) will only apply to a carrier "upon request of such carrier." [Section 601(h)(3)(B).] Therefore, the language of [s]ection 601 reflects that its preemptive effect was not intended to be all-encompassing.

The legislative history of [s]ection 601 supports a similar conclusion. According to the Conference Report, its passage was not designed to preempt all state regulation of motor carriage. Rather, it was intended only to "level the playing field between air carriers on the one hand and motor carriers on the other with respect to *economic* trucking regulation." (Conference Report, p. 82.) [Emphasis added.] Specifically, Congress sought to eliminate the substantial competitive advantage given to air carriers like Federal Express Corporation over traditional motor carriers like UPS as a result of *Federal Express Corp* v *California Public Utilities Comm*, 936 F2d 1075 (CA 9, 1991), cert den ___ US ___ (1992). The drafters' intent to achieve this result while limiting the breadth of [s]ection 601's preemptive effect can be discerned from page 85 of the Conference Report, where it is noted that:

> "New subsection (h)(2) emphasizes that *State authority to regulate safety, financial fitness and insurance*, transportation of household goods, vehicle size and weight and hazardous materials routing of motor carriers is unchanged since State regulation in those areas is not a price, route or service and thus is unaffected." [Emphasis added.]

The Conference Report goes on to disclose that, in return for an agreement by the American Trucking Association (ATA) to withdraw its opposition to the FAA[A] Act, Congress endeavored to structure [s]ection 601 in a way that would "allow regulatory protection to continue for noneconomic factors, such as liability rules, antitrust immunity to publish documents, insurance, safety, leasing and cargo credit rules." (Conference Report, p. 88.)

Based on [s]ection 601's wording and legislative history, the Commission concludes that it preempts only those provisions of the [MMCA] and the Rules relating to price, route, and service. In reaching this conclusion, the Commission specifically rejects [Appellant] Central's argument that, because the primary focus of the [MMCA] has always been on economic regulation, no basis exists for continuing state regulation of motor carriage. The Commission reaches this conclusion for two reasons. First, [s]ection 601 does not require that, to avoid preemption, safety regulation must be the primary focus of any state statute regulating motor carriage. Second, . . . safety concerns occupy at least co-equal status with the economic regulation found in the [MMCA]. For example: (1) the first clause of this title states that it is "[a]n act to promote safety upon and conserve the use public highways of the state;" (2) MCL 475.2 proclaims, in pertinent part, that "[i]t is hereby declared to be the purpose and policy of the legislature in enacting this law to confer upon the [C]ommission the power to . . . protect the safety and welfare of the traveling and shipping public in their use of the highways;" and (3) MCL 476.5 requires that, to receive a certificate of authority, a prospective

motor carrier must show that it is fit – which is defined as being safe, suitable, and financially responsible – and that its vehicles "may be operated safely upon the public highways."

Similarly, the Commission does not find persuasive [Appellant] Central's claim that, by using the phrase "motor vehicles" instead of "motor carriers" in portions of [s]ection 601(h)(2)(A), Congress intended to strip state regulatory commissions of their power to address safety issues and to limit the oversight of these issues to law enforcement agencies. At the federal level, the definition found at 49 USC 10102(13) shows that the phrase "motor carriers" refers only to common and contract motor carriers. In contrast, by reading 49 USC 10102(17) in conjunction with 49 USC 10102(16) and 49 USC 10102(26), it appears that the phrase "motor vehicles" extends to private motor carriers as well. Congress' use of the broader terms thus likely arose from a recognition that several state commissions regulate private carriers, in addition to common and contract carriers, at least with regard to safety. This fact, when coupled with [s]ection 601's legislative history, supports rejection of [Appellant] Central's claim.

For all of these reasons, the Commission finds that [s]ection 601 preempts only those portions of the [MMCA] and the Rules relating to price, route, and service. [Pages 20-24]

34. In its January 11, 1995 Opinion and Order, the Commission found consistent with the Conference Report to Section 601 that the Commission would continue to issue certificates of authority to motor carriers operating in intrastate commerce based upon the carrier's ability to

demonstrate compliance with state law regulating safety, financial fitness and insurance.

35. In its January 11, 1995 Opinion and Order the Commission found that neither the language of Section 601 nor the conference report imply that fees imposed by a state's existing regulatory structure might fall within issues related to price, routes or services, and that continued collection of the fees under MCL 478.2 was not preempted. The Commission attached to its January 11, 1995 Opinion and Order, a copy of the Michigan Motor Carrier Act and Rules showing which sections of the act and rules were preempted by drawing a line through the preempted sections.

EFFECT OF PREEMPTION ON MOTOR CARRIER DIVISION

36. The Motor Carrier Division Staff has used the January 11, 1995 Opinion and Order to guide its activities since January 11, 1995. Even prior to the Commission orders in Case No. T-1273, the Staff had taken steps to implement the federal act. New certificate application forms were developed and placed into use as of 11/15/94 which deleted all consideration of routes and services. All rates and tariffs were determined to be invalid as of 1/1/95 and all rate and tariff filings after that date were returned. Applications for certificates of authority continue to be reviewed to determine if the applicant has a satisfactory safety rating or other evidence that the carrier could or would operate safely. Insurance certification continues to be required and continuous coverage monitored. Household goods carriers continue to be regulated as to authority, rates and consumer protection. The 1995 certificate

and decal renewal process was performed as required by the statute and the Commission orders in Case No. T-1273. Further, the 1995 Single State Registration Renewal process for interstate motor carriers was continued.

37. The Motor Carrier Division works to promote safety upon the highways and to assure motor carrier fitness and compliance with existing state laws, regulations and orders of the Commission. The Safety and Compliance Section of the Motor Carrier Division works with the Motor Carrier Division of the Department of State Police to assure safe operations by motor carriers and ensure compliance with applicable laws. The Safety and Compliance Section is required to conduct review of applications for authority as mandated by the Commission's January 11, 1995 order implementing safety rating system, T-1281, which was issued in response to 1993 legislative amendments to the Motor Carrier Act, 1993 PA 352, MCL 479.41-43; MSA 22.587(1)(-)(3), which required the Commission to develop and implement a motor carrier safety rating system by January 1, 1995. Since passage of the FAAA Act and the resulting elimination of complaints about rates or services (except for household goods carriers) the Motor Carrier Division has focused more of its resources on the safety issues required by 1993 PA 254. In 1994, the MPSC Motor Carrier Division had 21 positions. After passage of the FAAA Act in August, new application forms were developed, new procedures put into effect and participation by Staff in the Commission's preemption proceeding was required. The Staff ceased accepting filings related to "rates, routes or services" on or about November 15, 1994 and began to accept applications for authority renewal based only on safety and fitness for operating year 1995.

38. Following preemption, the volume of applications for an original certificate of authority increased dramatically because of the changed entry requirements. The new safety rating system required by 1993 PA 352 and made effective January 1, 1995 required Staff to conduct a safety review of all of the new applicants as well as assuring proper insurance. It was evident that many of these applicants were unfamiliar with legal safety requirements such as drug testing and annual vehicle inspections, some did not even have a commercial drivers license. Thus, a significant education component was required in 1995 and the MPSC Staff worked with the Michigan Trucking Association to provide educational resources.

39. For the fiscal year ending 9/30/95, the Legislature has appropriated 2,162,200 to the Public Service Commission from motor carrier fees collected pursuant to the Motor Carrier Act. Of that amount, 1,584,800 was for the Motor Carrier Regulation Division and the remaining 577,400 for overhead and support operations of the Commission such as financial and personnel services and hearing officers. An additional 566,300 was appropriated to the Department of Commerce for support services such as office rent and data processing services. This appropriations act was signed in July of 1994 and did not anticipate the passage of the federal preemption act.

40. The fiscal year 1995-96 budget for the MPSC and the Department of Commerce reflects significantly less resources funded by motor carrier fees. In fiscal year 1994-95, the total motor carrier fees apportioned to the Public Service Commission and the Department of Commerce was $2,728,500. For fiscal year 1995-96, the aforementioned appropriated amount has been reduced to $1,936,000, a reduction of $791,500.

41. The unavailability of the motor carrier fees to support these appropriations would result in the elimination of approximately 22 positions supporting current in the continuing motor carrier regulation functions. A description of the specific functions of the MPSC Motor Carrier Regulation Division and how they are changed by the Federal Act are as follows:

a. *Safety and Compliance*: this work unit consists of three staff who perform safety evaluations on applicants for a MPSC certificate. They also handle complaints against motor carriers for safety or insurance problems. Prior to 1/1/95, they also handled complaints related to economic regulation. After the issuance of the Commission order on 1/11/95, T-1281 regarding the motor carrier safety rating system, the complexity of the safety evaluations significantly increased. The size of this unit has not changed as a result of preemption.

b. *Rates and Tariffs*: this work unit currently consists of one staff person who handles economic regulation of the household goods industry and water carriers and the few remaining elements of motor carrier rate regulation as provided by the FAAA Act, 49 USC 11501. Prior to 1/1/95, this unit also included an auditor. This position was eliminated due to preemption.

c. *Authorities*: this work component of the Operations Section consists of three staff persons who process applications for MPSC certificates. This administrative function involves working with applicants on requirements, notices, legal sufficiency of documents

and preparation of orders and certificates. Prior to 1/1/95, this work component had four staff, one staff position has been eliminated due to preemption by the FAAA Act.

d. *Revenue Collection and Issuance of Credentials*: The remaining staff positions of the Operations Section handle the various fee collections, issuance of decals and SSRS receipts and maintain a walk-in over-the-counter service for motor carriers. This function currently utilizes nine staff positions, but prior to preemption utilized 10 staff positions.

e. *Management*: The Motor Carrier Regulation Division also has a director and secretary.

REBUTTAL TO TNT HOLLAND'S AFFIDAVIT

44. Affiant has reviewed the intervenor's motion for summary disposition in this case as well as the affidavit of Mr. James C Crozier of TNT Holland Motor Express, Inc.

45. Affiant has a general knowledge of TNT Holland's operations in the State of Michigan based on several years of regulatory oversight. TNT Holland is a major intrastate motor carrier which generated over $11.8 million in strictly intrastate revenue in 1993. TNT Holland is the 5th largest general commodity motor carrier in terms of intrastate revenue and increased its intrastate revenue 27% in 1993 over 1992. TNT Holland operates a network of 7 terminals in the State of Michigan from which it makes daily pickups and deliveries to hundreds if not thousands of customers. It also has contracts with numerous large shippers which involve significant intrastate business. By its own admission it uses in excess of 1,300 trucks or tractors in intrastate commerce.

46. Mr. Crozier takes the position that TNT Holland's intrastate operations are incidental to its interstate operations and therefore the intrastate vehicle fee imposed by 478.2(1) is a burden on interstate commerce rather than intrastate commerce. The scope of operation described above demonstrates the contrary.

47. TNT Holland is a well managed, efficient and profitable motor carrier. Management decides which vehicles are to be used for intrastate operations based on the judgement that they will generate intrastate revenue. Those vehicles not used in Michigan intrastate commerce are not subject to the $100 vehicle fee.

48. Mr. Crozier states that TNT Holland engages in intrastate commerce in 17 states. Many of those states continue to regulate the intrastate operation of motor carriers and collect a certificate application fee, a renewal fee and an annual vehicle fee just like Michigan does. (See ***Exhibit B***).

49. Throughout the arguments of plaintiffs is the underlying premise that the 478.2(1) fee is an "interstate" fee and therefore a burden on interstate commerce. It is an intrastate fee. Interstate motor carriers pay vehicle specific fees pursuant to MCL 478.2(2) or 478.7 of the Motor Carrier Act. TNT Holland pays the intrastate vehicle fee, 478.2(1) for intrastate operations which generate revenues, and utilize state highways and police protection. If plaintiffs' arguments were accepted, any motor carrier with ICC authority could avoid paying state fees or taxes for intrastate operations. 478.2(1) is fair because all vehicles used in intrastate commerce pay the same fee in exchange for police protection and use of state highways.

50. Intervenors argue that a fee which affects interstate commerce must be apportioned or otherwise factored on a mileage basis or exposure criteria. The argument is fallacious. The Single State Registration Program (federally authorized), is based on a flat fee of $10.00 or less per vehicle. The Michigan vehicle registration fee to obtain license plates is based on vehicle weight. The so-called "flat fees" are administratively simple and efficient. The American Trucking Association for years has fought against distance taxes as being too inefficient and difficult to administer.

51. If every state in the Union adopted MCL 478.2(1) there could be no multiplicity of fees because the fees relate only to Michigan intrastate authority.

Further, affiant sayeth not.

Thomas R. Lonergan

Subscribed and sworn to before me
this **14th** day of **September, 1995.**

Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al,

Plaintiffs,

v

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants. /

File No. 95-15628 CM
Hon. James R. Giddings

TROY CAB, INC., et al,

Plaintiffs,

v

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants. /

File No. 94-15631 CM
Hon. James R. Giddings

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AFFIDAVIT OF TIMOTHY J. YUNGFER

Captain Timothy J. Yungfer, being first duly sworn, deposes and says as follows:

1. Affiant is a Captain, Commanding Officer of the Motor Carrier Division of the Department of State Police, located at 300 N. Clippert, Lansing, Michigan 48913.

2. The Motor Carrier Division, Department of State Police, is responsible for promoting safety upon the highways through enforcement of state and federal laws relating to commercial vehicles and their use of the highways, including the provisions of the Motor Carrier Act

(Act No. 254 of the Public Acts of 1933), the Motor Carrier Safety Act (Act No. 181 of the Public Acts of 1963), the Michigan Vehicle Code (Act No. 300 of the Public Acts of 1949) and the Fire Prevention Act (Act No. 207 of the Public Acts of 1941).

3. The Motor Carrier Division of the Department of State Police employs approximately 165 inspection and enforcement officers and 13 clerical personnel to carry out the various functions and duties of the Motor Carrier Division throughout the State of Michigan.

4. Approximately 40 of the uniformed enforcement officers are assigned to road patrol duties at state police posts throughout the state, and 68 uniformed officers are assigned to individual scale sites.

5. The uniformed officers have full enforcement authority to enforce all of the general laws of the state as they pertain to commercial vehicles.

6. There exists in the Motor Carrier Division four specialized groups which carry out specific functions promoting safety upon the highways through enforcement of laws relating to commercial vehicles and their operations.

7. The first specialized group is the Investigative Section made up of three uniform officers and a supervisory sergeant. The investigative section is responsible for reviewing complaints processed through the Michigan Public Service Commission. The primary focus of the Investigative Section as of May 1995 has been to conduct safety compliance review of motor carriers at their terminals or corporate offices within the state. A safety compliance review may include an on-site inspection of the motor

carrier's log books and files to determine if applicable motor carrier safety regulations are being followed. The investigative section is also responsible for on-site safety inspections of the motor carrier's vehicles at the terminal.

8. The second specialized group is the Hazardous Materials Section comprised of 11 uniformed enforcement officers and a sergeant supervisor. This section is responsible the enforcement of safety regulations related to the transportation of hazardous materials.

9. The third specialized group is the Management Audit Section. This section is comprised of three uniformed officers and a supervisory sergeant. The Management Audit Section is primarily responsible for conducting safety audits known as compliance reviews on interstate and intrastate motor carriers utilizing the United States Department of Transportation safety rating system.

10. The fourth specialized section is the Bus Inspection Section, comprised of twelve inspectors and uniformed enforcement officers supervised by a sergeant. This section is responsible for ensuring that all school buses meet safety and equipment standards required by state law.

11. In addition to the four specialized groups, the enforcement officers assigned to road patrol throughout the state conduct safety inspections of commercial vehicles stopped on the highways. Road patrol officers are also responsible for the enforcement of the criminal laws and general regulations pertaining to the operation of commercial vehicles on the highway, including the enforcement of moving violations and size and weight laws.

12. Enforcement officers assigned to scale facilities throughout the state to promote safety upon the highways

and protect highway infrastructure by enforcing size and weight laws, conducting driver and vehicle safety inspections of commercial vehicles, and inspecting for proof of registration, operating authority, proof of insurance, and documentation that taxes and fees have been paid.

13. During the 1993/1994 fiscal year, the Motor Carrier Division received and appropriation of approximately $14 million, allocated in the following manner.

a. $2,553,700 from Motor Carrier Fees collected under the provision of the Motor Carrier Act.

b. $944,100 from the Michigan Truck Safety Commission.

c. $5,944,000 from the State Trunkline Fund.

d. $2,553,700 from the federal Motor Carrier Safety Assistance Program. States receiving funds under this program are required to contribute 20% of the funds received for the grant. Motor Carrier Fees are used, in part, as the state match.

e. $749,100 from the state general fund for school bus inspections.

f. $368,900 from hazardous materials inspection fees.

14. The Department of State Police has received funding from the assessment of fees collected under the provision of The Motor Carrier Act (Act No. 254 of the Public Acts of 1933), for the enforcement of the provisions of The Motor Carrier Act and the enforcement of other safety laws and regulations pertaining to the operation of commercial vehicles, since the transfer of the motor carrier enforcement function to the Department of State Police from the Michigan Public Service Commission by Executive Order in 1982.

15. Since the 1991/92 fiscal year, the Motor Carrier Division of the Department of State Police has received and expended Motor Carrier Fees in accordance with the chart identified as attachment "B".

16. The unavailability of the approximate $2.6 million from motor carrier fees and the subsequent reduction in state matching funds for the motor carrier safety assistance program would result in the elimination of 45 uniform enforcement officer positions (not including the reduction in officers to pay for unemployment benefits) assigned to road patrol and weigh station operations. This represents an approximate one-third reduction in resources utilized to promote safety upon and conserve the use of state highways.

17. Since January 1, 1995, the Motor Carrier Division of the Department of State Police has been in compliance with the Federal Aviation Administration Authorization Act which prohibits states from enforcing any laws or regulations related to the price, route or services of a motor carrier.

Further affiant sayeth not.

/s/ Timothy J. Yungfer
Captain Timothy J. Yungfer

Subscribed and sworn to before me
this 14th day of September, 1995.

/s/ Carol Ann Dane
Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al,

Plaintiffs,

v

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants. /

File No. 95-15628 CM
Hon. James R. Giddings

TROY CAB, INC., et al,

Plaintiffs,

v

MICHIGAN PUBLIC SERVICE COMMISSION, et al

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File No. 94-15631 CM
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SUPPLEMENTAL AFFIDAVIT OF TIMOTHY J. YUNGFER

Timothy J. Yungfer, being first duly sworn, deposes and says as follows:

1. Affiant filed a previous Affidavit signed September 14, 1995, in the above captioned matter which inadvertently omitted that the statements were made on personal knowledge, and that if sworn as a witness, Affiant can testify competently to the facts stated in the Affidavit.

2. Also omitted from my original Affidavit signed September 14, 1995 was Attachment "B" referenced in paragraph 15 which shows appropriations received and expended by the Motor Carrier Division of the Department of State Police since 1991-1992 fiscal year. Attachment "B" is included with this Supplemental Affidavit.

3. Affiant has reviewed the contents of the Affidavit signed on September 14, 1995, and states affirmatively that the contents of the Affidavit are made on Affiant's personal knowledge, and that if sworn as a witness, Affiant can testify competently to the facts stated in the Affidavit.

Further, Affiant sayeth not.

/s/ Timothy J. Yungfer
Timothy J. Yungfer

Subscribed and sworn to before me
this 20th day of September, 1995.

/s/ Carol Ann Dane
Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

Prepared by Paul Walters 9/19/95

		Prorated Expenses*		
Fiscal Year	Appropriated Motor Carrier Fees	General Enforcement	Safety Inspections	Unexpended Motor Carrier Fees
1991/92	2,484,100	2,252.641	149,840	81,619
1992/93	2,484,100	2,323.966	143,234	16,900
1993/94	2,553,700	2,158,607	146,535	250,553
1994/95	2,571,400	2,332,703	144,864	93,833
1995/96	2,664,100			

* Fiscal Year 1994/95 are projected through year end. Expenses are prorated to percentage of funding from Motor Carrier Fees attributable to the General Enforcement and Safety Inspection Programs

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SUPPLEMENTAL AFFIDAVIT OF THOMAS R. LONERGAN

Thomas R. Lonergan, being first duly sworn, deposes and says as follows:

1. Affiant has reviewed the Affidavit signed September 14, 1995 and notes that the last sentence of Paragraph 50 should be changed to read as follows:

> The American Trucking Association for years has fought against weight-distance taxes as being too inefficient and difficult to administer.

2. Affiant's September 14, 1995 Affidavit also inadvertently omitted that the statements were made on personal knowledge, and that if sworn as a witness, Affiant could testify competently to the facts stated in the Affidavit.

3. Affiant has reviewed the contents of the Affidavit signed on September 14, 1995, and states affirmatively that the contents of the Affidavit are made on Affiant's personal knowledge, and that if sworn as a witness, Affiant can testify competently to the facts stated in the Affidavit.

4. Affiant submits that Plaintiffs mistakenly compare the federal limitations under the *Single State Registration System* (SSRS) on the state requirement that interstate carriers register their ICC authority with Michigan with Michigan's requirements [MCL 478.2(2)] that interstate carriers, licensed in this state, shall pay $100 for each vehicle "registered in this state and operating entirely in interstate commerce." Michigan's requirement that interstate carriers register their ICC authority is covered by MCL 478.7(4). Under the SSRS "registration" refers to registering ICC authority with the states. Under 478.2(2), a vehicle is "registered" in this state if it is commercially plated and registered in Michigan under the Vehicle Code or International Registration Plan (IRP).

5. The Single State Registration System (SSRS) allows states to charge interstate motor carriers $0-$10 per vehicle to register their ICC authority with a state. (MCL 478.2)2) charges interstate carriers for safety regulation or as stated in MCL 478.2 "for the administration of this act," $100 per vehicle but only on vehicles which display Michigan license plates. As the Director of

the Motor Carrier Division of the Michigan Public Service Commission which is responsible for the administration of the Motor Carrier Act, affiant assures the Michigan Public Service Commission that the MMCA is in compliance with federal law. To affiant's knowledge, Congress has never stated that the SSRS would prohibit or limit states power to tax motor carriers. See my original affidavit, Appendix 4, paragraph 9 and Exhibit A for explanation of our dual system of federal and state regulation, coupled with a copy of the general jurisdiction statute of the ICC, 49 USC section 10521 wherein it states:

> "This subtitle *does not*"
>
> . . .
>
> (1) except as provided in sections 10922(c), 10935, 10936, 11501(e), and *11501(h)* of this title, *affect the power of a state to regulate intrastate transportation provided by a motor carrier*;
>
> . . .
>
> (4) except as provided in sections 11503(a) and section 11504(b) of this title, *affect the taxation power of a state over a motor carrier.* (emphasis added).

6. The SSRS is found in section 11506 of the Interstate Commerce Act and is not mentioned as an exception and therefore is not a limitation on the states taxation power in section 10521(4), but the FAAA Act, 11501(h) is an expressed exception and therefore a limitation on the power of states to regulate intrastate transportation by motor carriers as contained in section 10521(1). If Congress intended to limit the taxation power of the states through the SSRS, section 11506, they would have included it as an exception to 49 USC 10521(4). Congress

certainly included the 1994 FAAA Act section 11501(h) as a limitation on states power to regulate intrastate transportation by including it in 49 USC 10521(1).

7. The SSRS fee of $0-$10 is levied by each state in which an interstate vehicle travels. The more states the vehicle travels through, the more the gross amount of the fee, which is then allocated among the states. However, Michigan does not collect the $10 fee for Michigan travel of an interstate vehicle if the vehicle has paid a $100 fee under either 478.2(1) (vehicles using intrastate authority) or 478.2(2) (vehicles licensed and registered in Michigan). Historically, the Michigan Public Service Commission has interpreted MCL 478.2(2)'s applicability requirement of "vehicles registered in Michigan" to mean vehicles which have Michigan license plates obtained through the Michigan Secretary of State.

8. Affiant submits that motor carriers such as TNT Holland are often referred to as "less-than-truckload" carriers. This refers to the method of operation that involves three phases. Phase one is the pickup phase in which trucks based at a terminal makes numerous small shipment pickups in an adjacent geographical area and returns these shipments to the terminal where they are unloaded. Phase two involves the "line-haul" in which shipments destined for another terminal location are consolidated and loaded on a truck for delivery to the remote terminal where the truck is once again unloaded. The third phase would be the delivery phase in which trucks based at the terminal deliver the various shipments in the adjacent geographical area. These shipments could consist of either interstate or intrastate shipments or both. However, in the case of TNT Holland with its network of seven Michigan terminals, substantial quantities of freight

would be strictly intrastate. It is also a common industry practice to dedicate a truck and driver to the same pickup, linehaul or delivery route. For example, the daily line-haul between Detroit and Grand Rapids would normally involve the same driver and probably the same truck each day.

9. The affidavit submitted by Mr. Crozier suggests a method of operation which differs from the typical less-than-truckload motor carrier and does not comport with MPSC staff's understanding of TNT Holland's method of operation.

10. The situation described by Mr. Crozier whereby vehicles operate in both interstate and intrastate commerce, and with intrastate shipments merely "topping off" trailer loads is not common and not applicable to an evaluation of 478.2(1) because:

(a) a majority of carriers or vehicles subject to the $100 fee in 478.2(1) are strictly intrastate only;

(b) those engaging in both intrastate and interstate commerce can pay $100 per vehicle pursuant to MCL 478.2(1) for intrastate vehicles and $10 or less for interstate vehicles pursuant to MCL 478.7(4) which is consistent with the federal SSRS.

(c) a carrier selects how to apportion vehicles as to interstate and intrastate business based on his own business judgement and circumstances;

(d) many, if not most routes, drivers, and trucks are fixed and routine, thereby allowing an informed business judgement as to appropriate regulation and fees;

(e) a driver and truck operating on a linehaul interstate route would normally not concern itself with pickup or delivery of a shipment in an intervening state, even for purposes of "topping off" a load as this would disrupt schedules and normal shipment patterns.

11. This Supplemental Affidavit is made on affiant's personal knowledge, and if sworn as a witness, affiant can testify competently to the facts stated in this Supplemental Affidavit.

Further, Affiant sayeth not.

/s/ Thomas R. Lonergan
Thomas R. Lonergan

Subscribed and sworn to before me
this 21st day of September, 1995.

/s/ Carol Ann Dane
Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

STATE OF MICHIGAN

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SECOND SUPPLEMENTAL AFFIDAVIT OF THOMAS R. LONERGAN

Thomas R. Lonergan, being first duly sworn, deposes and says as follows:

1. That in response to the Supplemental Affidavit of James C. Crozier, section 478.2(3) of the Motor Carrier Act allows for issuance of 72 hour (3 day) permits for a cost of $10.00. Therefore, a motor carrier that is only involved in occasional or incidental intrastate commerce would not have to pay $100 per vehicle pursuant to MCL 478.2(1). When an intrastate business opportunity arises, a motor carrier can obtain a $10.00 temporary permit. A motor

carrier could operate for up to 30 days using the 10 cards before reaching the equivalent of the $100 decal fee.

2. Plaintiffs suggest that the $100 per vehicle fee [478.2(1)] must be apportioned in some manner, such as mileage, but there is no data accumulation system available which could be used to separate miles traveled intrastate versus interstate. MCL 478.2(1) is based on transportation of intrastate shipments, and although the IRP requires motor carriers to declare in advance the number of miles traveled by each vehicle in each state, there is no declaration of intrastate miles charged. Therefore, the IRP system could not be used for mileage data of intrastate operations.

To devise a system based upon mileage would require accumulated data as to the number of intrastate shipments, the weight of such shipments, etc. to reach a reasonable apportionment of interstate versus intrastate revenue. This would make telephone service separations look simple. Both the motor carriers and the State of Michigan would need to devise complex systems for determining fee liability, billing, auditing and so forth. This approach appears to be administratively inefficient for the amount of fee revenue collected per year, approximately $3.5 million involving 3,000 motor carriers.

Further, affiant sayeth not.

/s/ Thomas R. Lonergan
Thomas R. Lonergan

Subscribed and sworn to before
me this 28th day of September, 1995.

/s/ Carol Ann Dane
Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

1995 FORM MCS-1

UNIFORM APPLICATION FOR SINGLE STATE REGISTRATION FOR MOTOR CARRIERS OPERATING UNDER AUTHORITY ISSUED BY THE INTERSTATE COMMERCE COMMISSION

Motor Carrier Identification Numbers — Application for Property Carriers Only

ICC MC Number(s):	US DOT Number:	FEIN Number:

Applicant (identical to name on ICC order)

Name:	Doing Business As (D/B/A):
Telephone Number:	Fax Number:

Address of Principal Place of Business: (A principal place of business is a single location that serves as a motor carrier's headquarters and where it maintains or can make available its operational records.)

Number and Street:	City:	State:	ZIP Code:

Mailing Address if Different from Business Address Above:

Number and Street:	City:	State:	ZIP Code:

Type of Registration: Passenger Carriers cannot register under Single State Registration in Michigan. Call 517/335-2475.

- ☐ **New Carrier Registration** – The motor carrier has not previously registered.
- ☐ **Annual Registration** – The motor carrier is renewing its annual registration.
- ☐ **New Registration State Selection** – The motor carrier has changed its principal place of business or its prior registration State has left the registration program. The prior registration state was _____

Type of Motor Carrier (check one):

☐ Individual ☐ Partnership ☐ Corporation – Enter state in which incorporated _____

List name and title of partners or officers:

_____ Name _____ Title

_____ Name _____ Title

_____ Name _____ Title

Type of ICC Registered Authority:

☐ Permanent Certificate or Permit ☐ Temporary Authority (TA) ☐ Emergency Temporary Authority (ETA)

Expiration Date: _____

STATE OF MICHIGAN IN THE COURT OF CLAIMS
[Caption Omitted In Printing]

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BEST AVAILABLE COPY

Type of Motor Carrier Operation: (check one only)

- ☐ **Transporter of Property** – Using freight vehicles with a gross vehicle weight rating of 10,000 pounds or more.
- ☐ **Transporter of Property** – Using only freight vehicles with a gross vehicle weight rating of less than 10,000 pounds.
- ☐ **Transporter of Passengers** – Using vehicles with a seating capacity of 16 passengers of more.
- ☐ **Transporter of Passengers** – Using only vehicles with a seating capacity of 15 passengers or less.

ICC Certificate(s) or Permit(s):

- ☐ ICC Authority Order(s) attached for first year registration.
- ☐ ICC Authority Order(s) attached for additional authority received.
- ☐ No change from prior year registration.

Proof of Public Liability Security:

- ☐ The applicant or its insurance company will file a copy of its proof of public liability security to the registration state.
- ☐ The applicant or its insurance company has filed a copy of its proof of public liability security with the registration state and the insurance coverage as stated on that form remains in effect.
- ☐ The applicant has an approved self-insurance plan or other security in full force and effect and the carrier is in full compliance with the conditions imposed by the ICC order. A copy of the ICC insurance order is attached or has previously been filed with the registered state.

Hazardous Materials: (check one)

- ☐ The applicant *will not haul* hazardous materials in any quantity.
- ☐ The applicant *will haul* hazardous materials requiring *$1 million* of Public Liability and Property Damage Insurance in accordance with Title 49 CFR 1043.2.
- ☐ The applicant *will haul* hazardous materials requiring *$5 million* of Public Liability and Property Damage Insurance in accordance with Title 49 CFR 1043.2.

Process Agent:

- ☐ ICC form Number BOC–3 or blanket designation attached for new registration.
- ☐ ICC form Number BOC–3 or blanket designation attached reflecting changes of designation of process agent.
- ☐ No change from prior year registration.

Certification:

I, the undersigned, under penalty for false statement, certify that the above information is true and correct and that I am authorized to execute and file this document on behalf of the applicant. (Penalty provisions subject to the laws of the registration state.)

Name (Printed) _____ Date _____

Signature _____ Title _____

CALCULATION OF FEE AMOUNTS DUE EACH STATE

Transporting: ☐ Property ☐ Passenger – Charter ☐ Passenger – Regular Route

For property transporting only. Passenger carriers contact the Michigan Department of Transportation at 517/335-2475.

Designated base state: ***MICHIGAN***

Name:	FAX Number:	ICC Number:

(A) Participating States	(B) Total Number of Vehicles	(C) Per Vehicle Fee		(D) Fee Times Number of Vehicles (Column B x C)
		Michigan Based	Quebec/Ontario Based	
Alabama		$ 6.00	$ 6.00	$
Arkansas		5.00	5.00	
California		0.00	5.00	
Colorado		5.00	5.00	
Connecticut		10.00	10.00	
Georgia		5.00	5.00	
Idaho		2.00	2.00	
Illinois		0.00	7.00	
Indiana		0.00	10.00	
Iowa		1.00	1.00	
Kansas		10.00	10.00	
Kentucky		10.00	10.00	
Louisiana		10.00	10.00	
Maine		8.00	8.00	
Massachusetts		10.00	10.00	
Michigan *		10.00	0.00	
Minnesota		.45	5.45	
Mississippi		10.00	10.00	
Missouri		0.00	10.00	
Montana		5.00	5.00	
Nebraska		0.50	3.50	
New Hampshire		10.00	10.00	
New Mexico		10.00	10.00	
New York		10.00	10.00	
North Carolina		0.00	1.00	
North Dakota		10.00	10.00	
Ohio		5.00	5.00	
Oklahoma		7.00	7.00	
Rhode Island		8.00	8.00	
South Carolina		5.00	5.00	
South Dakota		5.00	5.00	
Tennessee		8.00	8.00	
Texas		0.00	10.00	
Utah		6.00	6.00	
Virginia		10.00	10.00	
Washington		10.00	10.00	
West Virginia		3.00	3.00	
Wisconsin		5.00	5.00	

TOTAL OF ALL STATE FEES..... $

Note: Fees must be paid for each vehicle for each state of travel. Make check or money order (in U.S. funds) payable to the State of Michigan and mail to: Michigan Department of Commerce, Public Service Commission, 6545 Mercantile Way, P.O. Box 30221, Lansing, MI 48909-7721. If you have any questions about completing this form, please contact the Motor Carrier Unit at 517/334-7180 or 517/334-7154.

- Vehicles base-plated in Michigan need not be listed on the "Michigan" line above. Michigan based ICC carriers with vehicles based outside of Michigan must register those vehicles on this form at a fee of $10.00 per vehicle. Vehicles based in Michigan are required to have a $100.00 MPSC decal (Household Goods carriers $50.00). Use Equipment List (form P-344-T) to order MPSC decals.

STATE OF MICHIGAN

COURT OF APPEALS

WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., EL TORO MOTOR FREIGHT, INC., MYRIAH, INC., PRISM, INC., GERRIGS TRUCKING & LEASING, INC., and BEST WAY EXPRESS, INC.,

Plaintiffs-Appellants,

and

AMERICAN TRUCKING ASSOCIATION, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs-Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, and the STATE OF MICHIGAN,

Defendants-Appellees.

FOR PUBLICATION
March 11, 2003
9:00 a.m.

No. 226052; 226122
Court of Claims
LC No. 95-015628-CM

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, TIBERIO FRANK, d/b/a FAIRFIELD TOWING, ELEX, INC., d/b/a LAFOND EXPRESS, DALE CONSTINE & SONS, INC., CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY,

AMBASSADOR TRANSPORTATION, INC., HAWKINS STEEL CARTAGE, INC., MIDCON FREIGHT SYSTEMS, INC., JLH TRANSFER, INC., H & H ENTERPRISES, INC., d/b/a S & M CARTAGE, INC., CENTRAL TRANSPORT, INC., BANCROFT TRUCKING COMPANY, US TRUCK COMPANY, INC., WEST END CARTAGE, INC., CENTRAL CARTAGE COMPANY, CTX, INC., MOHAWK MOTOR MICHIGAN, INC., ECONOMY TRANSPORT, INC., MCKINLAY TRANSPORT LIMITED, MASON & DIXON LINES, INC., UNIVERSAL AMCAN LIMITED, ROMEO EXPEDITERS, INC., TOM THUMB SERVICES, INC., d/b/a REI, OJ TRANSPORT COMPANY, JLAW ENTERPRISES INC., and OJ TRANSPORT, INC.,

Plaintiffs-Appellants,

and

AMERICAN TRUCKING ASSOCIATION, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs-Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, DEPARTMENT OF COMMERCE, and the STATE OF MICHIGAN,

Defendants-Appellees.

No. 226053; 226137
Court of Claims
LC No. 95-015631-CM

Updated Copy
May 9, 2003

Before: Markey, P.J., and Saad and Smolenski, JJ.

SMOLENSKI, J.

In these consolidated class actions, plaintiffs, individual class-representative trucking companies, and intervening plaintiffs, two trucking companies, appeal by right from a December 30, 1998, judgment of the Court of Claims that granted summary disposition in favor of defendants. The appeals were consolidated. We affirm.

I

This case involves the effect of several federal laws, specifically 49 USC 11501, 49 USC 11506, and subsection 601(h) of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), PL 103-105, subsection 601(h), on various provisions of Michigan's Motor Carrier Act (MCA), MCL 475.1 *et seq.* This litigation began on January 3, 1995, when plaintiffs Westlake Transportation, Inc., et al., filed their complaint, alleging that the state's $100 annual fees for interstate and intrastate motor carriers were unconstitutional because federal laws, 49 USC 11506 and 49 USC 11501, respectively, preempted the state laws. On January 9, 1995, Troy Cab, Inc., et al., filed their complaint, and made similar allegations.

In Michigan, since 1933, motor-carrier regulation has been pursuant to the Michigan MCA. The act authorizes the Michigan Public Service Commission (PSC) to enforce the act. MCL 475.1(c); MCL 475.2. Under the MCA, motor carriers must pay a fee of $100 for each application filed with the commission for a certificate of authority or for a permit to operate intrastate. MCL 478.1. Also, motor carriers are required to pay an annual fee of $100 a vehicle

for the administration of the act. MCL 478.2(1) and (2). Subsection 1 applies to motor-carrier vehicles that operate intrastate pursuant to a certificate of authority, while subsection 2 applies to motor-carrier vehicles licensed in Michigan that engage entirely in interstate commerce.[1] The act also provides that motor carriers that are registered outside Michigan are required to pay a registration fee of $10 a vehicle. MCL 478.7.

In February 1995, intervening plaintiffs filed their complaint, alleging that the intrastate-decal fee violated the Commerce Clause, US Const, art I, § 8, cl 3, and were subsequently granted the right to intervene. Plaintiffs Westlake Transportation, Inc., et al., and intervening plaintiffs both amended their complaints, adopting the other's substantive claims. The plaintiffs' cases were consolidated in April 1995 and the classes were certified in June 1995.

On June 22, 1995, plaintiffs filed two separate motions for partial summary disposition pursuant to MCR 2.116(C)(10): one regarding their intrastate-preemption claim and the other regarding their interstate-preemption claim. On June 30, 1995, intervening plaintiffs filed their motion for partial summary disposition pursuant to MCR 2.116(C)(10), regarding their claim alleging violation of the Commerce Clause. On October 27, 1995, defendants renewed their own motion for summary disposition. The Court of Claims issued its opinion on October 13, 1998,

[1] The fees in MCL 478.1 and 478.2(1) will be referred to as the "intrastate fees," and the fee in MCL 478.2(2) will be referred to as the "interstate fee."

concluding that plaintiffs' and intervening plaintiffs' claims were meritless, and denied their motions for partial summary disposition in an order entered on November 12, 1998. Subsequently, the court granted defendants' motion for summary disposition "for the reasons defendants stated in their November 10, 1998 supplemental brief," which relied on the court's October 13, 1998, opinion.

The court concluded that § 601 of the FAAAA did not preempt MCL 478.2(1) because the federal law did not preempt safety-related regulatory fees. The court also found that MCL 478.2(2) was not preempted because the federal law imposed the $10 maximum only on "participating states," not "registration states." The court further determined that MCL 478.2(1) did not implicate the Commerce Clause because it did not burden foreign motor carriers more heavily as compared to Michigan motor carriers engaged in interstate commerce, since the state statute only affects Michigan motor carriers who engage solely in intrastate commerce. Plaintiffs filed a motion for reconsideration, which was denied. Plaintiffs and intervening plaintiffs now appeal by right.

II

Summary disposition of all or part of a claim or defense may be granted when

> [e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim, and is reviewed de novo on appeal. *Spiek v Dep't of*

Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley,* 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b), *Meyer v Center Line,* 242 Mich App 560, 574; 619 NW2d 182 (2000). All reasonable inferences are to be drawn in favor of the nonmovant. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 618; 537 NW2d 185 (1995).

III

Plaintiffs argue that MCL 478.2(2) is preempted by federal law, specifically 49 USC 11506.[2] Determining whether federal law preempts a state law presents an issue of statutory construction and is a question of law. *Konynenbelt v Flagstar Bank, FSB,* 242 Mich App 21, 27; 617 NW2d 706 (2000). Congressional intent is the cornerstone of preemption analysis. *Fort Halifax Packing Co, Inc v Coyne,* 482 US 1, 8; 107 S Ct 2211; 96 L Ed 2d 1 (1987).

The Supremacy Clause of the United States Constitution provides Congress with the power to preempt state law. US Const, art VI, cl 2. A general presumption exists in the law against federal preemption. *Duprey v Huron & E R Co, Inc,* 237 Mich App 662, 665; 604 NW2d 702 (1999).

[2] This statute is currently codified as 49 USC 14504; however, we will refer to the law as § 11506.

Federal preemption occurs only under certain conditions, such as when (1) Congress enacts a federal statute that expresses a clear intent to preempt state law, (2) an outright or actual conflict exists between federal and state law, (3) compliance with both federal and state law is effectively impossible, (4) an implicit barrier to state regulation exists in federal law, (5) Congress has legislated comprehensively, thereby occupying an entire field and leaving no room for supplemental state law, or (6) the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Id.*

49 USC 11506 provided, in part:

> (b) General rule. – The requirement of a State that a motor carrier, providing transportation subject to jurisdiction under subchapter I of chapter 135 and providing transportation in that State, must register with the State is not an unreasonable burden on transportation referred to in section 13501 when the State registration is completed under standards of the Secretary under subsection (c). When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden.
>
> (c) Single State registration system. –
>
> (1) In general. – The Secretary shall maintain standards for implementing a system under which –
>
> (A) a motor carrier is required to register annually with only one State by providing evidence of its Federal registration under chapter 139;

(B) the State of registration shall fully comply with standards prescribed under this section; and

(C) such single State registration shall be deemed to satisfy the registration requirements of all other States.

(2) Specific requirements. –

(A) Evidence of Federal registration; proof of insurance; payment of fees. – Under the standards of the Secretary implementing the single State registration system described in paragraph (1) of this subsection, only a State acting in its capacity as registration State under such single State system may require a motor carrier registered by the Secretary under this part –

(i) to file and maintain evidence of such Federal registration;

(ii) to file satisfactory proof of required insurance or qualification as a self-insurer;

(iii) to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and

(iv) to file the name of a local agent for service of process.

(B) Receipts; fee system. – The standards of the Secretary –

(i) shall require that the registration State issue a receipt, in a form prescribed under the

standards, reflecting that the carrier has filed proof of insurance as provided under subparagraph (A)(ii) of this paragraph and has paid fee amounts in accordance with the fee system established under clause (iv) of this subparagraph;

(ii) shall require that copies of the receipt issued under clause (i) of this subparagraph be kept in each of the carrier's commercial motor vehicles;

(iii) shall not require decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by the carrier;

(iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that –

(I) is based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates;

(II) minimizes the costs of complying with the registration system; and

(III) results in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and

(v) shall not authorize the charging or collection of any fee for filing and maintaining evidence of Federal registration under subparagraph (A)(i) of this paragraph.

(C) Prohibited fees. – The charging or collection of any fee under this section that is not in accordance with the fee system established under

> subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce.

The MCA applies to entities engaged in interstate commerce only to the extent it is consistent with federal law. MCL 476.12. MCL 478.2(2) provides, in pertinent part, "A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce."[3]

Plaintiffs contend that the interstate fee was preempted both before and after the implementation of the Single State Registration System (SSRS) on January 1, 1994. With the implementation of the SSRS, § 11506 was amended and significant language changes were made. We will first address plaintiffs' preemption argument regarding § 11506 after January 1, 1994. However, before we do so, an understanding of the evolution of this federal law is helpful. The United States Supreme Court has summarized this evolution in *Yellow Transportation, Inc v Michigan*, 537 US ___, ___; 123 S Ct 371, 374-375; 154 L Ed 2d 377, 383-384 (2002):

> Beginning in 1965, Congress authorized States to require interstate motor carriers operating within their borders to register with the State proof of their Interstate Commerce Commission (ICC) interstate operating permits. Pub L 89-170, 79 Stat 648, 49 USC § 302(b)(2) (1970 ed). Congress provided that state registration requirements

[3] The subsection also provides that the fee is only $50 if the motor carrier begins operations after June 30th of the year. The other provisions in the subsection are not at issue in this appeal.

> would not constitute an undue burden on interstate commerce so long as they were consistent with regulations promulgated by the ICC. *Ibid.*

Prior to 1994, the ICC allowed States to charge interstate motor carriers annual registration fees of up to $10 per vehicle. See 49 CFR § 1023.33 (1992). As proof of registration, participating States would issue a stamp for each of the carrier's vehicles. § 1023.32. The stamp was affixed on a "uniform identification cab car[d]" carried in each vehicle, within the square bearing the name of the issuing State. § 1023.32(d)-(e). This system came to be known as the "bingo card" system. *Single-State Insurance Registration*, 9 ICC2d 610, 610 (1993).

The "bingo card" regime proved unsatisfactory to many who felt that the administrative burdens it placed on carriers and participating States outweighed the benefits to those States and to the public. HR Rep No 102-171, pt I, p 49 (1991), HR Conf Rep No 102-404, pp 437-438 (1991), US Code Cong & Admin News 1991, pp 1526, 1679. In the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Congress therefore directed the ICC to implement a new system to replace the "bingo card" regime.* See Pub L 102-240, § 4005, 105 Stat 1914, 49 USC § 11506(c) (1994 ed). Under the new system, called the Single State Registration System, "a motor carrier [would be] required to register annually with only one State," and "such single State registration [would] be deemed to satisfy the registration requirements of all other States." §§ 11506(c)(1)(A) and (C). Thus, one State would – on behalf of all other participating States – register a carrier's vehicles, file and maintain paperwork, and collect and distribute

registration fees. § 11506(c)(2)(A). Participation in the Single State Registration System was limited to those States that had elected to participate in the "bingo card" system. § 11506(c)(2)(D).

ISTEA also capped the per-vehicle registration fee that participating States could charge interstate motor carriers. Congress directed the ICC to "establish a fee system . . . that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." § 11506(c)(2)(B)(iv). Congress provided that the charging or collection of any fee not in accordance with the ICC's fee system would "be deemed to be a burden on interstate commerce." § 11506(c)(2)(C).

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*Congress abolished the ICC in 1995 and assigned responsibility for administering the new Single State Registration System to the Secretary of Transportation. See ICC Termination Act of 1995, Pub L 104-88, § 101, 109 Stat 803. The provisions of ISTEA governing the system were amended and recodified. See 49 USC § 14504(c). The Federal Highway Administration, under the Secretary of Transportation, adopted the ICC regulations that implemented the Single State Registration System, 61 Fed Reg 54706, 54707 (1996), and the Federal Motor Carrier Safety Administration now has authority to administer the system, 49 USC § 113(f)(1).

A

Plaintiffs argue that the federal statutory language is clear – a state may charge a maximum registration fee of $10 a vehicle to motor carriers engaged in interstate commerce, regardless of whether a motor carrier is registered in Michigan or another state. Plaintiffs acknowledge that MCL 478.7 reflects the mandate of § 11506 with regard to motor carriers registered out of state,[4] and asserts that motor carriers registered in Michigan are required to be charged similarly.

Defendants' counterargument is two-fold. First, § 11506 applies to registration fees only, not regulatory fees, and the interstate fee at issue is a regulatory fee. Second, the fee limit in § 11506 applies to participating states only, not the registration state. The court agreed with defendants' argument and granted summary disposition on this issue for the same reasons. Therefore, the key questions are (1) to whom does the fee limit in § 11506 apply, and (2) to what type of fees. The answers to these questions can be found in the language of the statute itself and the federal regulations that interpret it.

It is not an unreasonable burden on interstate commerce to require vehicles to register with a state; however,

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[4] MCL 478.7 provides, in part:

> (4) The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00. The commission may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection.

any registration requirements of a state that are in excess of the standards in subsection 11506(c) are considered an unreasonable burden. Subsection 11506(b). Under the SSRS, a motor carrier is required to register annually with only one state, and that registration satisfies the registration requirements of all the states. Subsection 11506(c)(1)(A). A motor carrier may only register with a participating state, a state which participated in the old "bingo card" system. Subsection 11506(c)(2)(D). The motor carrier must register with the state where its principal place of business is located, if it is a participating state, or else register with the participating state in which it operates the most vehicles. 49 CFR 367.3.[5] Therefore, a registration state, the state in which a motor carrier registers, is by definition a participating state. Michigan is a participating state, *Yellow Transportation, supra,* 123 S Ct 376; 154 L Ed 2d 385, and therefore, can be a registration state.

The registration state may require a motor carrier to (1) file proof of its federal registration (ICC permit), (2) file proof of insurance, (3) file the name of its agent for service of process, and (4) pay a fee. Subsection 11506(c)(2)(A). The registration state is then to issue the motor carrier a receipt, reflecting that proof of insurance was filed and that the fee was paid, a copy of which is to be kept in the carrier's vehicles. Subsection 11506(c)(2)(B). The fee is for the filing of the proof of insurance, and may not be charged for the filing of the motor carrier's ICC permit. Subsections 11506(c)(2)(B)(iv) and (v).

[5] 49 CFR 1023.1 *et seq.*, was recodified as 49 CFR 367.1 *et seq.*

In support of the registration fee, the motor carrier must file with the registration state a form that delineates (1) the number of vehicles it intends to operate in each participating state, (2) the fee each participating state charges each vehicle, (3) the total fee due each participating state, and (4) the total of all the fees due. 49 CFR 367.4(c)(4). The fee each participating state is allowed to charge each vehicle is equal to the amount the state charged or collected as of November 15, 1991, not to exceed $10. Subsection 11506(c)(2)(B)(iv)(III); 49 CFR 367.4(c)(4)(ii). Congress wanted to "minimize[] the costs of complying with the registration system" for the motor carriers, subsection 11506(c)(2)(B)(iv)(II), while at the same time preserving "revenues for the states which had participated in the bingo program," HR Conf Rep No 102-404 reprinted in 1991 USCCAN 1817. The fees a registration state collects on behalf of other participating states are remitted to those states monthly. 49 CFR 367.6. Thus, if a motor carrier registered in Michigan, it would first list the number of vehicles it operated in each participating state. Because Michigan is a participating state, it would need to list the number of vehicles it operated in Michigan. The fee Michigan could charge cannot exceed $10.

We find that the statutory language and its accompanying federal regulations are clear. A registration state is simply a participating state in which a motor carrier is registering. Therefore, when the statute states that a participating state may not charge a fee in excess of $10, this includes the registration state. To conclude otherwise, that a registration state could set its own fee, would contravene the express language and purpose of the statute.

The next question is whether the $100 fee in MCL 478.2(2) is a registration fee, so that it is subject to the limitation in § 11506, or whether it is a regulatory fee. Plaintiffs assert that the fee is for all practical purposes a registration fee. Because the fee must be paid at the time a motor carrier registers with a state, and in return for the fee receives an identification decal, plaintiffs contend that one can only conclude that the fee is, in actuality, a registration fee. We disagree. Faced with a similar situation in *Franks & Son, Inc v Washington,* 136 Wash 2d 737, 759-760; 966 P2d 1232 (1998), the Washington Supreme Court rejected the plaintiffs' argument that because the regulatory fee and federal identification fee were collected at the same time, an unlawful registration requirement resulted. The court adeptly stated, "We believe a more realistic rationale for concurrent collection of the two fees was administrative convenience and efficiency." *Id.* at 760.

We find that the $100 interstate fee could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of the MCA, particularly covering costs of enforcing safety regulations.[6] If the purpose of a fee is to regulate an industry or service, it can be properly classified as a regulatory fee. *Bolt v Lansing,* 459 Mich 152, 161-162; 587 NW2d 264 (1998). Because the fee in

[6] Because vehicles licensed in Michigan that operate solely interstate are required to pay the $100 regulatory fee, the PSC waives the registration fee. *Schneider Nat'l Carriers, Inc v Michigan (On Remand),* 247 Mich App 716, 721; 637 NW2d 838 (2001). Hence, the registration fee Michigan charges for vehicles licensed in Michigan is $0, less than the $10 limit imposed by § 11506. Therefore, the registration fee is within the federal mandate.

MCL 478.2(2) is not a registration fee, it is not subject to preemption by 49 USC 11506.

Plaintiffs argue that the federal law prohibits construing the fee as a regulatory fee, citing *Roadway Express, Inc v Treasurer of State of Illinois,* 120 Ill App 3d 133; 458 NE2d 66 (1983). That case involved a $31 registration fee Illinois charged Ohio motor carriers. *Id.* at 133-134. At the time, the federal regulation allowed a maximum registration fee of $5 plus an additional reasonable fee imposed to defray the cost of the regulation of carriers within the state's borders. *Id.* at 135. Plaintiffs contend that *Roadway Express* "issued a warning" that "no such additional 'regulatory fee' was permissible after 1981" because the federal regulation interpreting § 11506 was amended in 1981 and set an absolute limit of $10 for identification fees. However, *Roadway Express* issued no such warning. The court merely noted, "again parenthetically," that the federal regulation, 49 CFR 1023.33 (redesignated), was amended and set the limit at $10. *Roadway Express, supra* at 135.

Plaintiffs appear to argue that because the amended federal regulation did not explicitly provide for an additional fee, one was hence prohibited. However, plaintiffs provide no support for their argument. Further, plaintiffs fail to recognize the import of two other regulations in existence at the time. 49 CFR 1023.105 (1991) (superseded) provided that the rules and regulations were not to be construed to affect the collection of taxes or fees by a state from motor carriers for the operation of vehicles within the borders of a state. 49 CFR 1023.104 (1991) (superseded) provided that states were "urged" to use fees collected for the purpose of defraying the cost of regulation of motor carriers within their borders. Therefore, the

ability of a state to collect fees in addition to the registration fees was not affected by the removal from § 1023.33 of the language providing for additional fees.[7]

B

Plaintiffs also argue that the interstate fee was prohibited before the creation of the SSRS in 1994, under the previous version of § 11506. Plaintiffs assert this argument because their complaint was filed in the beginning of 1995, and with a three-year period of limitation, plaintiffs contend that they are entitled to a refund for the excess fees they have paid since 1992.

Before the 1994 enactment of the SSRS, § 11506 read, in pertinent part:

> (b) The requirement of a State that a motor carrier . . . register the certificate or permit issued to the carrier under section 10922 or 10923 of this title is not an unreasonable burden on transportation referred to in section 10521(a)(1) and (2) of this title when the registration is completed under standards of the Commission under

[7] We note that the substance of 49 CFR 1023.104 and 1023.105 was not included in the 1994 amendments, 49 CFR 1023.1-1023.6. However, neither was there any express prohibition on state-imposed regulatory fees. The statute and its regulations address registration requirements only. Because there is a presumption against federal preemption, we believe that Congress's silence cannot be interpreted as prohibiting state regulatory fees, see *Wisconsin Pub Intervenor v Mortier*, 501 US 597, 607; 111 S Ct 2476; 115 L Ed 2d 532 (1991), particularly given that regulatory and registration fees can coexist in the same field without conflicting, *Duprey, supra* at 665.

> subsection (c) of this section. When a State registration requirement imposes obligations in excess of the standards, the part in excess is an unreasonable burden.
>
> (c)(1) The Commission shall maintain standards and amendments to standards (A) prepared and certified to it by the national organization of the State Commissions, and (B) prescribed by the Commission. . . .

The Commission prescribed the following interpretive regulation:

> The application for the issuance of such identification stamps or number shall . . . be duly completed and executed by an official of the motor carrier, and shall be accompanied by the fee, if any, prescribed by the law of such State; provided, however, that such fee shall not exceed $10 for the issuance of each such identification stamp; and provided further (when the State Commission assigns an identification number in lieu of issuing an identification stamp or stamps), that such fee shall not exceed $10 for each vehicle operated under the authority of the motor carrier identified in the cab card bearing such identification number. [49 CFR 1023.33 (superseded).]

The pre-1994 federal regulation substantively mirrored subsection 11506(c) as amended in 1994. Because we concluded that the interstate fee is a regulatory fee, it is outside the scope of the federal law and was not preempted.[8]

[8] We note that the cases from other jurisdictions that plaintiffs cite are inapplicable in this case. The conclusion in this case turns on

(Continued on following page)

Accordingly, the court did not err in granting defendants summary disposition.

IV

In their complaints, plaintiffs and intervening plaintiffs allege that the intrastate fees in MCL 478.1 and MCL 478.2(1) were preempted by § 601 of the FAAAA. Subsection 601(h), which became effective on January 1, 1995, prohibited state regulation of prices, routes, or services of motor carriers, save for a few delineated exceptions. (Currently codified as 49 USC 14501[c].)

Plaintiffs argue that the court erred in granting defendants summary disposition on this issue before discovery was complete.[9] Plaintiffs assert that they should have been allowed an opportunity to conduct additional discovery in order to show that, as utilized, the intrastate fees are prohibited by federal law.

In re Fed Preemption of Provisions of the Motor Carrier Act, 223 Mich App 288, 302; 566 NW2d 299 (1997), held that § 601 did not preempt the entire MCA and did not indicate an intent to preempt fee provisions such as MCL 478.1 and MCL 478.2. The Court noted that in response to the enactment of the FAAAA, the PSC "issued considered decisions that indicated how its regulation of the trucking industry in Michigan was affected by federal

whether the interstate fee is classified as a regulatory fee or a registration fee. In the cases plaintiffs cite, there was no disagreement that the fee at issue was a registration fee.

[9] We note that plaintiffs do not contest the court's summary-disposition ruling, that § 601 did not preempt the intrastate fees.

legislation preempting at least some aspects of state regulation." *In re Motor Carrier Act, supra* at 300. In regard to the fee provisions at issue, the Court stated:

> The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for a certificate, MCL 478.1a; MSA 22.560(1), and for administering the act, MCL 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact, *because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules.* Indeed, appellants Central Transport and Universal Am-Can have not shown that the cost of the PSC's operations has ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation. [*Id.* at 302-303; emphasis added.]

Plaintiffs contend that the PSC intrastate fees were being used to fund preempted portions of the MCA, and, thus, the fees were related to a preempted provision. Therefore, the fees were also preempted. Plaintiffs did not submit any documentary evidence below in support of this contention. Plaintiffs argue that they had intended to do so, but their opportunity was foreclosed when the court denied their motion for partial stay and bifurcation of issues. Plaintiffs requested a 90- to 120-day stay in the proceedings to conduct discovery in order to present a

factual record to the court in a supplemental brief in response to the decision in *In re Motor Carrier Act, supra*; however, the court denied the motion without prejudice because it believed its summary-disposition ruling would cover the issue.

A court's decision regarding matters of discovery is reviewed on appeal for an abuse of discretion. *In re Pott*, 234 Mich App 369, 373; 593 NW2d 685 (1999). Plaintiffs could not address this Court's decision in *In re Motor Carrier Act, supra*, in their original motions for partial summary disposition because they were filed and argued in 1995, and the case was not decided until April 25, 1997. However, plaintiffs did not file their motion for partial stay and bifurcation of issues until March 1998, nearly one year later. The record indicates that plaintiffs were conducting discovery during this entire time, yet never sought evidence relating to this issue.

We find that plaintiffs had ample opportunity to conduct discovery following the decision in *In re Motor Carrier Act, supra*, and file a supplemental brief containing their findings. Given that one year had passed, we also find that there is no reason to believe that had plaintiffs been given another three or four months in which to conduct discovery, plaintiffs would have uncovered a factual basis for their claim. Furthermore, we note that by stipulation, discovery was to be completed 180 days after the court issued its ruling on the parties' motions for summary disposition.

Plaintiffs assert in their reply brief that they are not arguing that they were prevented from conducting discovery, but that they were denied an opportunity to supplement their motion papers. However, the court did not

foreclose plaintiffs' opportunity to present their argument. They could have filed additional briefs at any time before the court issued its ruling. In fact, on January 28, 1998, plaintiffs filed a supplemental brief in support of their motions for summary disposition and in opposition to defendants' motion, in which they specifically mentioned *In re Motor Carrier Act, supra*. This indicates plaintiffs were well aware of the import of the case, and could have conducted discovery and presented their argument accordingly. Plaintiffs mention that defendants did not submit the opinion as authority until January 1998. However, *In re Motor Carrier Act* was decided in April 1997, and nothing prevented plaintiffs from proactively distinguishing their case from it.

Moreover, the court specifically invited plaintiffs to present their argument again if they thought its ruling did not adequately cover the issue. Plaintiffs did file a motion for reconsideration after the court issued its orders on the parties' motions for summary disposition, yet did not reraise this issue. We recognize that plaintiffs renewed their motion to stay on October 8, 1998; however, this was before the court issued its ruling. Because the court had not yet issued its ruling, plaintiffs could have attempted to conduct discovery after its first motion was denied.

Therefore, we conclude that the court did not abuse its discretion in denying plaintiffs' request to stay the proceedings in order to conduct additional discovery. A decision of a court that obtained the correct result, albeit for a different reason, will be affirmed on appeal. *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001).

V

Plaintiffs Troy Cab, Inc., et al., allege that the intrastate fees in MCL 478.1 and MCL 478.2(1) are unconstitutional taxes in violation of various sections of the Michigan Constitution. The fees at issue are credited to the PSC. MCL 478.6. Whether a charge is a permissible fee or an illegal tax is a question of law. *Bolt, supra* at 158. A court's factual findings are reviewed for clear error. A finding is clearly erroneous when, although there is evidence to support it, upon reviewing the entire record, the appellate court is left with a definite and firm conviction that a mistake was made. *Christiansen v Gerrish Twp,* 239 Mich App 380, 387; 608 NW2d 83 (2000).

In determining whether a charge imposed by a unit of government is a fee or a tax, a court must consider: (1) whether the charge serves a regulatory purpose rather than operates as a means of raising revenue; (2) whether the charge is proportionate to the necessary costs of the service to which it is related; and (3) whether the payor has the ability to refuse or limit its use of the service to which the charge is related. *Bolt, supra* at 161-162. These factors should be considered in their totality, and a weakness in one area does not mandate a particular finding. *Id.* at 167; *Graham v Kochville Twp,* 236 Mich App 141, 151; 599 NW2d 793 (1999).

Taxes have a primary purpose of raising revenue, while fees are usually in exchange for a service rendered or a benefit conferred. *Bolt, supra* at 162. The stated purpose of the intrastate fees is for "the administration of [the MCA]." MCL 478.1; MCL 478.2(1). The express purposes of the act are

to confer upon the [PSC] the power and authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to: (a) Relieve all future undue burdens and congestion on the highways arising by reason of the use of the highways by motor vehicles operated by motor carriers; (b) protect and conserve the highways and protect the safety and welfare of the traveling and shipping public in their use of the highways; (c) promote competitive and efficient transportation services; (d) meet the needs of motor carriers, shippers, receivers, and consumers; (e) allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; (h) promote intermodal transportation; (i) prevent unjust discrimination; (j) promote greater participation by minorities in the motor carrier system; (k) provide and maintain service to small communities and small shippers; (l) prevent evasion of this act through any device or arrangement; (m) promote entrepreneurship in the motor carrier industry by allowing greater contract carrier economic and entry flexibility; and (n) promote the use of jointly considered and initiated rates, classifications, divisions, allowances,

charges, or rules of motor carriers under commission approved agreements. [MCL 475.2.[10]]

This language indicates the exactions are regulatory.

Taxes are designed to raise revenue for the general public, while a fee "confers benefits only upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee." *Graham, supra* at 151. In this case, in exchange for the fees, a motor carrier receives the right to operate its trucks in Michigan, and the fees are used to enforce the provisions of the act that carry out the above-listed purposes. Thus, there is a direct benefit to the one who pays the fees. We recognize that promoting and regulating safe use of the highways benefits the general public as well. However, a regulatory fee can have dual purposes and still maintain its regulatory characterization. As long as the primary purpose of a fee is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose, *id.* at 151, and thus benefit the general public.

Plaintiffs' argument focuses on the second prong of the test, whether the fees are proportional to the cost of the services to which they relate. Plaintiffs assert that in 1982, when the fees were increased,[11] they became taxes because the amounts collected were in excess of the

[10] Any purposes that related to economic regulation were preempted by § 601 of the FAAAA as of January 1, 1995, and the PSC ceased to enforce those regulations. *In re Motor Carrier Act, supra* at 300. However, the Legislature has yet to amend the MCA to reflect the federal preemption.

[11] 1982 PA 399 raised the fees in MCL 478.1 and MCL 478.2(1) to their current levels.

expenses related to the services. A fee must be proportionate to the cost of the regulation, but its amount is presumed reasonable unless its unreasonableness is established. *Id.* at 151. "[W]here revenue generated by a regulatory 'fee' exceeds the cost of regulation, the 'fee' is actually a tax in disguise." *Gorney v Madison Hgts,* 211 Mich App 265, 268; 535 NW2d 263 (1995).

In support of their contention, plaintiffs presented two affidavits and a senate fiscal report. We find the affidavits of minimal value in determining whether the fees are unreasonable. Neither of the affiants worked for the PSC and they could only offer their opinion regarding how the fees were spent. The senate fiscal report, created by a senate fiscal analyst, showed how the funds received by the PSC were utilized for fiscal years 1982-83 to 1994-95,[12] and one of the charts showed that there was a surplus nearly every year.[13]

[12] Plaintiffs also assert that the report shows that the fees supported activities not related to the regulation of motor carriers because a portion was allocated to the State Police, Department of Commerce, and Department of Civil Service. However, it is the duty of the police to assist the PSC in enforcement of the MCA, MCL 479.13, and the Department of Commerce provides administrative support to the PSC that enables it to carry out its duties. It follows that the PSC would allocate a portion of the fees to them. In addition, the allocation of a very small portion of the PSC's revenues to the Department of Civil Service is mandated by the Legislature in accordance with the constitution to fund the civil service. Const 1963, art 11, § 5. The allocations to this department averaged only $23,000 each year when revenues ranged from $3.2 to $6.3 million.

[13] Plaintiffs present no evidence regarding the proportionality of the fees after 1995, when the PSC ceased any economic regulatory functions as mandated by § 601 of the FAAAA. Therefore, we have no basis on which to determine the proportionality of the fees after 1995.

However, defendants dispute the accuracy of the figures in the report. Defendants note that charts reflect the total fees collected, not just the fees collected pursuant to MCL 478.1 and MCL 478.2(1), and defendants got confirmation from the author of the report that appropriations to the Michigan Truck Safety Fund were not considered. Therefore, defendants contend that the excess amounts were distorted.

It is clear that the report on which plaintiffs rely included all fee revenues without excluding nonchallenged interstate fees collected pursuant to the SSRS and its predecessor system. Therefore, the surplus figures were distorted to some degree. Even without reducing the surplus figures, the aggregate excess during the thirteen years was only 11.7 percent, a relatively small percentage. The test is whether the fee is proportional, not whether it is equal, to the amount required to support the services it regulates. *Graham, supra* at 151. We conclude that the Court of Claims did not clearly err in finding that the fees were not "wholly disproportionate."

Lastly, plaintiffs argue that the exaction is not voluntary because a motor carrier cannot operate its trucks in Michigan without paying it. Defendants argue that a motor carrier has a choice with regard to what extent its trucks will have a presence in Michigan, and, therefore, the exaction is voluntary. While this is true in regard to the application fee, MCL 478.1, defendants' logic is erroneous in regard to the administration fee, MCL 478.2(1), because every vehicle licensed in Michigan must pay this fee irrespective of where it operates. Even if we were to view the exaction as more compulsory than voluntary, when the totality of factors are considered, we believe the exactions are most properly classified as regulatory fees.

Bolt, supra at 167; *Graham, supra* at 151. Therefore, the court did not err in granting defendants summary disposition on this issue.

VI

Plaintiffs next argue that the intrastate and interstate fees violate the Equal Protection Clause of the United States and Michigan Constitutions because they apply to "for-hire" motor carriers only and not to private motor carriers.[14] Both the federal and state constitutions guarantee equal protection, and afford similar protection. Const 1963, art 1, § 2; US Const, Am XIV, § 1; *Vargo v Sauer,* 457 Mich 49, 60; 576 NW2d 656 (1998). A court's ruling whether a statute violates equal protection is a question of law. *McDougall v Schanz,* 461 Mich 15, 24; 597 NW2d 148 (1999).

Legislative classifications that do not implicate a fundamental right or target a suspect class are presumed to be constitutional if they have a rational basis, and one who challenges such a statute has the burden of showing that it bears no rational relation to some independent and legitimate legislative end. *TIG Ins Co, Inc v Dep't of Treasury,* 464 Mich 548, 557; 629 NW2d 402 (2001); *Vargo, supra* at 60. Under the rational-basis test, a statute will ordinarily be sustained if it can be said to advance a legitimate governmental interest, even if the law seems to be unwise or works to the disadvantage of a particular

[14] Because we concluded that the fees are regulatory, plaintiffs additional argument, that the fees violate Michigan's Uniform Taxation Clause, is without merit.

group, or if the rationale seems to be tenuous. *People v Copper (After Remand)*, 220 Mich App 368, 372-373; 559 NW2d 90 (1996). A legislative classification may not be set aside if any set of facts may reasonably be conceived to justify it. *Id.* at 373.

Before 1994, the fees were used to fund the economic- and safety-regulation of motor carriers. Motor carriers do not include private carriers. MCL 475.1(i). A private carrier is "any person engaged in the transportation of property by motor vehicle upon public highways where the transportation is incidental to, or in furtherance of, any commercial enterprise of the person, other than transportation." MCL 475.1(q). A "for hire" motor carrier is one that receives "remuneration or reward of any kind, paid or promised, either directly or indirectly." MCL 475.1(e). Thus, "for hire" motor carriers are engaged in the business of transportation.

The rationale behind the classification distinction may be supported by facts either known or reasonably assumed, even if those facts may be debatable. *TIG Ins, supra* at 557, citing *Crego v Coleman*, 463 Mich 248, 259-260; 615 NW2d 218 (2000). We believe it is reasonable to assume that motor carriers have larger fleets than private carriers, operate under competitive pressures, and operate more frequently than private carriers. We can surmise that these carriers are in need of being more closely scrutinized in order to protect the general public, which also uses the public highways; thus, the need for regulations and fees to cover their enforcement.

Even after economic regulation of the motor carriers ceased, as *In re Motor Carrier Act, supra* at 302, recognized, the PSC "still has significant regulatory obligations,"

including supervising and regulating the safety of motor-carrier operations, as well as the certification process. Therefore, the need for fees to support such regulations were not eliminated after the FAAAA was enacted. The same concerns that existed before still existed. Accordingly, we conclude that the Legislature's classification bore a rational relation to a legitimate state purpose, and the court did not err in granting defendants summary disposition.

VII

Finally, intervening plaintiffs argue that the intrastate fee imposed by MCL 478.2(1) violates the Commerce Clause because it burdens interstate commerce. Again, we disagree, but for a different reason than stated by the Court of Claims.

The Commerce Clause provides that Congress "shall have power . . . [t]o regulate commerce . . . among the several states. . . ." US Const, art I, § 8, cl 3. The "dormant Commerce Clause" "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc v Dep't of Environmental Quality of the State of Oregon*, 511 US 93, 98; 114 S Ct 1345; 128 L Ed 2d 13 (1994).

The Court of Claims held that the Commerce Clause was not implicated because the fee applied to intrastate carriers only. However, any tax or regulation that affects interstate travel, even if imposed solely on intrastate commerce, is subject to Commerce Clause analysis. *Citizens for Logical Alternatives & Responsible Environment v Clare Co Bd of Comm'rs*, 211 Mich App 494, 499; 536 NW2d 286 (1995). Because the fee is imposed on any

vehicle that operates intrastate pursuant to a certificate of authority, even if it also travels interstate, the fee affects interstate commerce, and thus, implicates the dormant Commerce Clause. Although the Court of Claims did not address this issue, our review is nevertheless proper because whether a statute violates the Commerce Clause is a question of law. *Gillette Co v Dep't of Treasury*, 198 Mich App 303, 311; 497 NW2d 595 (1993).

"A statute is presumed constitutional absent a clear showing to the contrary." *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992). The test for determining whether a regulatory fee violates the Commerce Clause involves a two-tiered approach.[15] The first step is to determine whether the statute discriminates against interstate interests or merely regulates evenhandedly with only incidental effects upon interstate commerce. *Oregon Waste, supra* at 99. "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* The United States Supreme Court has recognized that there is no clear line separating the two categories. The critical consideration is the overall effect of the statute on both local and interstate activity. *Brown-Forman Distillers Corp v New York State Liquor Auth*, 476

[15] Intervening plaintiffs contend that the four-pronged test enunciated in *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977), and utilized in *American Trucking Ass'ns, Inc v Scheiner*, 483 US 266, 283; 107 S Ct 2829; 97 L Ed 2d 226 (1987), is applicable. However, this test is used to analyze the constitutionality of state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, *Complete Auto, supra* at 279, not regulatory statutes.

US 573, 579; 106 S Ct 2080; 90 L Ed 2d 552 (1986). A state law will be invalidated if it "discriminate[s] against an article of commerce by reason of its origin or destination out of State." *C & A Carbone, Inc v Town of Clarkstown, New York*, 511 US 383, 390; 114 S Ct 1677; 128 L Ed 2d 399 (1994).

In making this determination, we must consider all the provisions of the challenged statute. MCL 478.2(1) requires that motor carriers that are licensed in Michigan and travel solely intrastate or travel both intrastate and interstate, a "mixed" carrier, must pay a fee of $100 for each vehicle. MCL 478.2(2) requires that motor carriers that are licensed in Michigan and travel solely interstate must also pay the $100 fee. Therefore, the regulatory fee is the same for all motor carriers licensed in Michigan, regardless of their final destination. It does not directly regulate interstate commerce, *Pike v Bruce Church, Inc*, 397 US 137, 142; 90 S Ct 844; 25 L Ed 2d 174 (1970), nor is economic protectionism at issue, *Arkansas Electric Coop Corp v Arkansas Pub Service Comm*, 461 US 375, 394; 103 S Ct 1905; 76 L Ed 2d 1 (1983).

Defendants assert that the majority of vehicles that pay the fee operate solely intrastate, which presumably leads to their conclusion that the effect on interstate commerce is minimal. However, the number of interstate vehicles burdened is inconsequential to a finding of discrimination. *New Energy Co of Indiana v Limbach*, 486 US 269, 276-277; 108 S Ct 1803; 100 L Ed 2d 302 (1988).

Intervening plaintiffs argue that the mixed carrier invariably will pay a higher per-mile fee than the carrier who operates solely intrastate. They assert that because the fee is a flat annual fee, in order to receive the greatest

benefit for the fee, a carrier would need to maximize its intrastate operations and this could potentially affect a carrier's economic decisions by discouraging an intrastate carrier from engaging in interstate commerce.

While this may be so, it is a matter of pure speculation. Intervening plaintiffs present no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could occur in the hypothetical. Only one affidavit was submitted by intervening plaintiffs, in which James Crozier, manager of licensing and fuel for intervening plaintiff TNT Holland Motor Express, Inc., stated that mixed carriers often top off their interstate loads with intrastate hauls or transport intrastate loads in between interstate hauls. However, he never averred that this was done only because of the fee imposed by MCL 478.2(1). Regardless of the $100 fee, topping off loads or adding intrastate hauls in between interstate ones is an economically efficient decision for the motor carriers. We do not find that the fee raises a significant barrier to participation in interstate trade. Any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination.

Having concluded that the statute regulates evenhandedly, it will be upheld unless the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike, supra* at 142. Intervening plaintiffs do not contest that the statute serves a legitimate nondiscriminatory purpose, i.e., funding safety and related regulations. This is an exercise of the state's police power and serves a critical function in protecting the people who use Michigan's highways. Great deference is given to state legislation in the field of highway safety regulation and a strong presumption in favor of its validity

exists. *Raymond Motor Transportation, Inc v Rice,* 434 US 429, 443; 98 S Ct 787; 54 L Ed 2d 664 (1978). On the basis of the record before us, we cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways. Therefore, we hold that MCL 478.2(1) does not violate the Commerce Clause. Accordingly, we affirm the Court of Claims' summary-disposition ruling in favor of defendants even though it reached its decision for the wrong reason. *Lavey, supra* at 250.

Affirmed.

/s/ Michael R. Smolenski
/s/ Jane E. Markey
/s/ Henry William Saad

Supreme Court, U.S.
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(10)

No. 03-1230

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *ET AL.*,

Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

As reformulated by the Court, the question presented is:

"Whether the $100 fee [imposed by Michigan in Mich. Comp. Laws § 478.2(1)] upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Michigan Court of Appeals were Westlake Transportation, Inc., Vanverkooi Carriers, Inc., El Toro Motor Freight, Inc., Myriah, Inc., Prism, Inc., Gerrigs Trucking & Leasing, Inc., Best Way Express, Inc., Troy Cab., Inc., Deeco Services, Inc. d/b/a Deeco Transportation, Tiberio Frank d/b/a Fairfield Towing, Elex, Inc. d/b/a/ Lafond Express, Dale Constine & Sons, Inc., Calcut Sales & Services, Inc. d/b/a Calcut Trucking Company, Ambassador Transportation, Inc., Hawkins Steel Cartage, Inc., Midcon Freight Systems, Inc., JLH Transfer, Inc., H & H Enterprises, Inc. d/b/a S & M Cartage, Inc., Central Transport, Inc., Bancroft Trucking Company, US Truck Company, Inc., West End Cartage, Inc., Central Cartage Company, CTX, Inc., Mohawk Motor Michigan, Inc., Economy Transport, Inc., McKinlay Transport Limited, Mason & Dixon Lines, Inc., Universal Amcan Limited, Romeo Expediters, Inc., Tom Thumb Services, Inc. d/b/a REI, OJ Transport Company, JLAW Enterprises, Inc., OJ Transport, Inc., Michigan Public Service Commission, Michigan Department of Treasury, Michigan Department of Commerce, the State of Michigan, American Trucking Associations, Inc., and TNT Holland Motor Express, Inc. Petitioner TNT Holland Motor Express, Inc. has since become USF Holland, Inc.

The parent company of petitioner USF Holland, Inc. is USF Corporation. No publicly held corporation owns more than 10% of the stock of USF Holland, Inc. Petitioner American Trucking Associations, Inc., has no parent corporation and there is no publicly held company owning 10% or more of its stock.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Michigan Court of Appeals (J.A. 68-102) is reported at 662 N.W.2d 784. The opinions of the trial court (Pet. App. 33a-60a) and the orders of the Michigan Supreme Court denying review (Pet. App. 61a-63a) are unreported.

JURISDICTION

The order of the Michigan Supreme Court denying review of the judgment of the Michigan Court of Appeals was entered on December 3, 2003. The petition for a writ of certiorari was granted on January 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

Section 478.2(1) of the Michigan Compiled Laws provides in relevant part:

> In addition to the license fees or taxes otherwise imposed upon motor carriers, there shall be assessed against and collected from each such motor carrier for the administration of this act, an annual fee of $100.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier[.]

STATEMENT

This case involves a flat tax that Michigan imposes on all trucks that engage in intrastate operations in the State (the "Michigan tax") – even if the trucks subject to the tax also spend some (or most) of their time traveling in *other* states or in interstate commerce. This tax should not survive scrutiny under the Commerce Clause. It is undeniable that the Michigan tax imposes significant structural impediments that discourage and burden interstate commerce: if replicated by other states, taxes like Michigan's would impose a potentially crushing, cumulative burden on trucks that conduct business in more than one state. It is equally apparent that the Michigan tax discriminates against interstate commerce in its practical impact because the levy necessarily applies at a much lower effective rate to trucks that confine their operations to Michigan than it does to otherwise identical vehicles that operate interstate. The decision below upholding the Michigan tax accordingly should be set aside.

1. Michigan imposes a flat tax of $100 per vehicle that has been interpreted to apply only to motor carriers that transport property between points within the State. MCL § 478.2(1). See J.A. 70-71. The same tax must be paid both by vehicles that confine their operations to Michigan and by those that engage in a combination of interstate and intrastate operations.[1] The amount due does not vary according to miles traveled or number of trips taken in Michigan, and is not apportioned to take into account the percentage of a vehicle's total miles that are driven between states or intrastate in states other than Michigan. Proceeds from the fee are used primarily for the "administration" of Michigan's law relating to the operation of motor carriers. MCL § 478.2(1); see J.A. 91.[2]

[1] A separate charge of $100 per vehicle is imposed on vehicles registered in Michigan that operate exclusively in interstate commerce. MCL § 478.2(2). That levy is challenged on preemption grounds in No. 03-1234, *Mid-Con Freight Systems, Inc.* v. *Michigan Public Service Comm'n*. In addition, the State requires trucks that are registered outside Michigan to pay a registration fee of $10. MCL § 478.7. The validity of that charge is not at issue here.

To illustrate the operation of the Michigan tax, consider the example of a truck that accrues virtually all of its annual mileage traveling interstate, but makes a single intrastate delivery while passing through Michigan by hauling a load between two points in the State.[3] That truck is obligated to pay the full $100 Michigan tax. At the same time, an identical truck that travels the same number of annual miles but confines its operations to Michigan, conducting hundreds of trips within the State during the course of the year, will pay the same $100 tax. The only way for the interstate truck to avoid

[2] Prior to 1995, Michigan had a comprehensive regulatory system governing the intrastate transportation of property by motor carriers. During that period, the proceeds from the Michigan tax were used to pay for administration of this system. See MCL § 475.2. As of January 1, 1995, Congress preempted most state economic regulation of intrastate trucking operations, including regulation of intrastate prices, routes, and services; states retained responsibility for regulation of highway safety. See Federal Aviation Administration Authorization Act of 1994, Pub. L. 103-305, § 601(a)(1), 108 Stat. 1605, codified at 49 U.S.C. § 14501(c). Michigan did not amend its motor carrier law or reduce the Michigan tax to reflect this change (see J.A. 93 n.10), although the State now takes the position that fees collected pursuant to the Michigan tax are devoted to non-preempted regulation of highway safety, financial fitness, and insurance requirements for motor carriers. See *id.* at 87-88.

[3] This is a realistic example; interstate truckers often supplement their interstate deliveries by hauling intrastate loads while between interstate movements or by "topping off" those loads with intrastate shipments. See J.A. 101.

payment of the Michigan tax would be for it to forgo intrastate business while it is passing through Michigan.

2. Petitioners brought this challenge in Michigan state court to contest the constitutionality of the Michigan tax under the U.S. Constitution's Commerce Clause.[4] Petitioners relied on the four-part Commerce Clause test first articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), under which a state tax will be deemed unconstitutional unless it "'[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'" *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995) (quoting *Complete Auto Transit*, 430 U.S. at 279). Petitioners maintained that the invalidity of the Michigan tax under the Commerce Clause was established by the Court's decision in *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), which struck down a flat state tax imposed on trucks traveling interstate.

The trial court rejected the challenge, upholding the Michigan tax. Pet. App. 33a-45a. The court declared itself "not persuaded that the choice of whether to engage primarily in interstate rather than exclusively in intrastate transportation, made by private businesses competing in the free marketplace, affects Commerce Clause concerns." *Id.* at 43a. Moreover, because the court believed that "the fee itself is not a tax on the privilege of doing business in Michigan," it concluded that "Commerce Clause interests are not affected by the intrastate vehicle fee." *Id.* at 44a. The court added that the "interest furthered by [the] fee" – that of ensuring "that vehicles and carriers operating on Michigan highways in intrastate service comply with [state] safety and fitness norms" – does "not have a prejudicial effect on interstate commerce and thus does not impact the Commerce Clause." *Ibid.* Similarly, the court reasoned that, because interstate and intrastate carriers are not competing for interstate business, the Michigan tax "does not implicate Commerce Clause concerns." *Id.* at 45a. See *id.* at 46a-60a (denying rehearing).

[4] The current petitioners intervened to advance their Commerce Clause claim in a suit initiated as a class action by other plaintiffs that challenged other Michigan trucking fees on federal preemption and state-law grounds, and that also contested the Michigan tax on preemption grounds. See J.A. 71. The courts below denied all of the claims and upheld all of the challenged levies. See *id.* at 72-102. Only the Commerce Clause challenge to the Michigan tax is at issue in this case; as noted above, the preemption aspect of the decision below as it relates to Michigan's fee on trucks that are registered in Michigan and that travel interstate is at issue in No. 03-1234, *Mid-Con Freight Systems, Inc.* v. *Michigan Public Service Comm'n*.

The Michigan Court of Appeals affirmed, although on a different ground. J.A. 62-102. The court began by repudiating the trial court's rationale, explaining that "any tax or regulation which affects interstate travel, even if imposed solely on intrastate commerce, is subject to Commerce Clause analysis. * * * Because the fee is imposed on any vehicle which operates intrastate pursuant to a certificate of authority, even if it also travels interstate, the fee affects interstate commerce, and thus, implicates the dormant Commerce Clause." *Id.* at 98-99.

Having said that, however, the court proceeded to uphold the Michigan tax. In doing so, the court relied upon an earlier aspect of its decision in which it determined, as a matter of *state* law, that the Michigan tax should be characterized as a "fee" rather than a "tax" because (1) most of its proceeds are used to enforce the regulatory provisions of Michigan's motor carrier law and (2) the aggregate fee revenues collected "are proportional to the cost of the services to which

they relate." J.A. 91-96.[5] From that starting point, the court held that the *Complete Auto Transit* test is wholly inapplicable to the Michigan tax on the ground that "this test is used to analyze the constitutionality of state-taxation statutes [that] tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, * * * not regulatory statutes." *Id.* at 99 n.15. Because the court had found the Michigan tax to be a "regulatory fee," it disregarded *Complete Auto Transit* and instead applied the balancing test used by this Court in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), to assess the constitutionality of nondiscriminatory state regulations affecting interstate commerce. See J.A. 99 n.15, 100-102.

The court recognized that it is impermissible for even "regulatory fees" to discriminate against interstate commerce, and acknowledged that, under the Michigan tax, it "may be" that "mixed [interstate and intrastate] carrier[s] invariably will pay a higher per-mile fee than the carrier who operates solely intrastate." J.A. 100-101. The court similarly noted the possibility "that because the fee is a flat annual fee, in order to receive the greatest benefit for the fee, a carrier would need to maximize its intrastate operations and this could potentially affect a carrier's economic decision-making by discouraging an intrastate carrier from engaging in interstate commerce." *Ibid.* But the court nevertheless opined that the prospect of discrimination "is a matter of pure speculation" because petitioners "present no evidence that any trucking firm's route choices are affected by imposition of the

[5] The court undertook this analysis in response to the argument that various Michigan levies, including the Michigan tax, "are unconstitutional taxes in violation of various sections of the Michigan constitution." J.A. 91. The court concluded that state law distinguished between "a permissible fee" and "an illegal tax," and that the challenged levies should be characterized as fees for purposes of Michigan law. *Id.* at 91-96.

fee." *Id.* at 101. The court added that "[a]ny effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination." *Ibid.* The court went on to uphold the Michigan tax under the standard articulated in *Pike* v. *Bruce Church* because "we cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways." *Id.* at 102.

The Michigan Supreme Court denied review without opinion. Pet. App. 61a-63a.

SUMMARY OF ARGUMENT

A. Under the Court's modern doctrine, the constitutionality of a state tax under the Commerce Clause is assessed by considering the practical effect of the levy: it will be invalidated if it discourages or disadvantages interstate commerce. The Court has given force to this principle by applying the dictates articulated in *Complete Auto Transit*, under which a state tax will be held unconstitutional unless, among other things, it is fairly apportioned and nondiscriminatory. For a number of related reasons, the Michigan tax does not satisfy these requirements.

First, as the Court held in *Scheiner*, flat taxes like Michigan's fail the "internal consistency" test and thus necessarily impose unfair structural burdens on interstate commerce. If applied by every jurisdiction, taxes like Michigan's would impose cumulative burdens on interstate truckers that are not born by equivalent intrastate activity. It is inevitable that such flat taxes bear much more heavily in the aggregate on a firm that does business in many places than on an otherwise identical company that operates in only one state. Indeed, the Michigan tax is especially pernicious because it has a clear protectionist effect: it allows trucks to pass through the state without charge, but penalizes interstate carriers who choose

to stop and compete with local truckers for intrastate business in Michigan.

Second, flat taxes like Michigan's necessarily discriminate against interstate firms even on the intrastate portion of their business. While such taxes nominally apply in the same amount to interstate and intrastate businesses, the very nature of the market that interstate operators serve makes it impossible for such businesses to take full advantage of the privilege for which they have paid the state a flat fee. The result, as the Court observed in *Scheiner*, is that, on average, a trucking company that confines its operations to intrastate travel will drive far more miles within the taxing state – and will obtain a vastly greater benefit from its intrastate fee – than will an otherwise identical company that travels both intrastate and interstate. The interstate company therefore will pay the tax at a higher effective rate. This regime places interstate businesses at a substantial competitive disadvantage.

Third, the rationales used by the court below to uphold the Michigan tax lack merit. The distinction that court drew between "regulatory fees" and general taxes rests on a manifest evasion of this Court's precedents: whatever the label placed upon a flat levy by the state, the tax will have the identical – and unconstitutional – effect of suppressing interstate commerce. By the same token, the court erred in insisting on empirical proof that interstate commerce has been discouraged before a flat tax will be invalidated as discriminatory. In fact, this Court repeatedly has rejected the contention that the plaintiff challenging a discriminatory tax must show that the levy actually succeeded in suppressing interstate commerce. Flat taxes necessarily discriminate against interstate activities in what the Court has described as "'the general average of instances'" (*Scheiner*, 483 U.S. at 291 (citation omitted)), and that disparity renders such levies unconstitutional.

B. In its brief supporting the grant of certiorari, the United States suggested that certain of this Court's older decisions could support the constitutionality of the Michigan tax. Those holdings, however, provide no guidance for the resolution of this case. They were decided during a period when the Court took what it has since described as a "metaphysical" approach to the Commerce Clause: the Court regarded interstate commerce "itself" as immune from state taxation, while it treated "local" activities as immune from Commerce Clause scrutiny. In that context, the decisions cited by the Solicitor General addressed the formal and rather artificial question whether particular state taxes should be treated as falling on interstate rather than local functions; those decisions simply did not consider the discrimination and apportionment arguments presented here.

More fundamentally, since issuing those decisions the Court has rejected metaphysics and substituted a realistic assessment of practical effects in assessing the constitutionality of state taxation under the Commerce Clause. That evolution has led the Court to reject both sides of its prior, formalistic Commerce Clause equation. Interstate commerce is no longer immune from state taxation, so long as the tax is apportioned and nondiscriminatory; taxation of intrastate activities is no longer immune from Commerce Clause scrutiny, so long as the taxation has an effect on interstate commerce. Thus, to the extent that the decisions cited by the United States stand for the proposition that taxes on intrastate activities are not subject to Commerce Clause challenge, those decisions are no longer good law.

Any contrary conclusion would have pernicious consequences. Virtually all interstate activities can be broken down into component parts that take place entirely within one state. As a consequence, a holding that some category of taxes on intrastate events is immune from the usual Commerce Clause rules would invite manipulation and gamesmanship by state

taxing authorities; it also would require the Court to draw the sort of bizarre and unrealistic distinctions that it emphatically rejected in *Complete Auto*. The ancient doctrine cited by the United States accordingly should not be regarded as controlling here.

ARGUMENT

In this case, the Court is "[a]gain * * * 'asked to decide whether state taxes as applied to an interstate motor carrier run afoul of the commerce clause, Art. I, § 8, of the Federal Constitution.'" *Scheiner*, 483 U.S. at 268 (citation omitted). Although the Court once famously described its "own decisions in this area as a 'quagmire'" (*id.* at 280 (citation omitted)), the modern rule governing cases of this sort is now settled: a state tax will not survive Commerce Clause scrutiny if, in its practical effect, it disadvantages or discriminates against interstate commerce. As decisions of this Court such as *Scheiner* and *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946), make clear, the Michigan tax does just that. The tax threatens to impose cumulative burdens that discourage truckers from doing business in more than one state; it unquestionably gives local truckers a competitive advantage over their interstate counterparts; it acts as a barrier to interstate carriers entering the intrastate market; and a decision upholding the tax would read illogical and unadministrable distinctions into the law. The decision below accordingly should be reversed.

A. The Controlling Principle: The Commerce Clause Invalidates State Laws That Discourage And Discriminate Against Interstate Commerce

1. As the Court has observed repeatedly, the Commerce Clause

> reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Jefferson Lines, 514 U.S. at 180 (citations and internal quotation marks omitted). See, *e.g.*, *Oregon Waste Sys., Inc.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). Against this background, the Court has understood the Clause to prevent states "from retreating into economic isolationism or jeopardizing the welfare of the Nation as a whole" (*Jefferson Lines*, 514 U.S. at 179-180), either by discriminating against interstate commerce overtly or by imposing taxes that more subtly "exert[] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Scheiner*, 483 U.S. at 286-287 (quoting U.S. Const., Art. I, § 8, cl. 3).

In giving force to these values, the Court in its modern Commerce Clause decisions addressing state taxation has eschewed "a focus on * * * formalism [that] merely obscures the question whether the tax produces a forbidden effect." *Complete Auto Transit*, 430 U.S. at 288. Instead, the Court has determined the validity of state taxes by assessing their "practical effect" on interstate commerce. *Id.* at 279. See, *e.g.*, *Jefferson Lines*, 514 U.S. at 183; *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615 (1981). Thus, as one leading scholar of the Commerce Clause has noted, "the Court should and will give consideration to any demonstrable, realistic claim that a state tax has a seriously harmful effect on interstate commerce." Lockhart, *A Revolution in State Taxation of Commerce?*, 65 MINN. L. REV. 1025, 1038 (1981).

2. As we have noted, in the area of state taxation the Court implements these controlling Commerce Clause prin-

ciples through application of what has become the familiar four-part test first articulated in *Complete Auto Transit*. Under that test, a state tax will be held unconstitutional unless it "'[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'" *Jefferson Lines*, 514 U.S. at 183 (quoting *Complete Auto Transit*, 430 U.S. at 279). This case involves the second and third prongs of the *Complete Auto* standard, the requirements of apportionment and nondiscrimination.

Satisfaction of these requirements, in turn, may be determined by application of what the Court has termed the "internal consistency" test. As the Court has explained:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.

Jefferson Lines, 514 U.S. at 185 (emphasis added). Because a state tax that fails the internal consistency test places interstate commerce at an insuperable structural disadvantage, failure of that test demonstrates that the tax both discriminates against interstate commerce and is malapportioned. See *Tyler Pipe Indus., Inc.* v. *Washington State Dep't of Revenue*, 483 U.S. 232, 247 (1987) (noting the test's application to both the nondiscrimination and the apportionment requirements); *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 644 (1984) (same); *United States* v. *Sperry Corp.*, 493 U.S. 52, 61 (1989) (noting test's application to the nondiscrimination requirement); *American Trucking Ass'ns, Inc.* v. *State of New Jersey*, 852 A.2d 142, 163-164 (2004) (same); *American Trucking Ass'ns, Inc.* v. *State of Oregon*, 90 P.3d 15, 21 (Or. App. 2004) ("'Internal consistency' appears to be the primary test for determining whether a tax discriminates against interstate commerce in its effect.").

B. The Michigan Tax Discriminates Against Interstate Commerce And Does Not Satisfy The Commerce Clause Apportionment Requirement

Flat taxes such as Michigan's necessarily fail the internal consistency test, and thus do not satisfy the nondiscrimination and fair apportionment elements of *Complete Auto Transit*. This is so for two related reasons. Such taxes impose cumulative burdens on companies doing business in more than one state that may make it prohibitively expensive to engage in commerce in a multitude of states. And flat levies like Michigan's discriminate against interstate commerce in a comparative sense because they impose a much higher effective per-mile rate on interstate trucks than on vehicles that confine their operation to the taxing state. Taxes like Michigan's therefore are inconsistent with the Commerce Clause.

1. The Michigan tax imposes cumulative burdens on interstate commerce

To begin with, the Michigan tax imposes structural burdens that discourage and disadvantage interstate commerce. The Court's decision in *Scheiner*, which applied the internal consistency test to invalidate flat highway taxes that were identical in their constitutional defects to the levy challenged here, shows why this is so. *Scheiner* involved a challenge to two flat taxes – a "marker fee" and an "axle tax" – imposed by Pennsylvania on both interstate and intrastate truckers. See 483 U.S. at 273-275. In holding the taxes unconstitutional, the Court explained that the Commerce Clause "'by its own force created an area of trade free from interference by

the States'" (*id.* at 280, quoting *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977)), and then concluded that

> [t]he unapportioned flat taxes * * * penalize some travel within the free trade area. Whether the full brunt, or only a major portion, of their burden is imposed on the out-of-state carriers, their inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania. To pass the "internal consistency" test, a state tax must be of a kind that, "if applied by every jurisdiction, there would be no impermissible interference with free trade." *Armco Inc.* v. *Hardesty*, 467 U.S., at 644. If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred.

Id. at 284.

The reason is obvious: unapportioned levies necessarily impose cumulative burdens on interstate commerce that are not borne by equivalent intrastate activity – and that is so whether the flat tax is imposed on the privilege of entering the state or on the privilege of engaging in business within the state. Imagine, for example, a flat tax of $100 (like the one set by Michigan in this case) that is imposed on all trucks that use a State's roads to make an intrastate delivery. If identical taxes were imposed by the 48 contiguous States, a truck that traveled across the country and made intrastate as well as interstate deliveries along the way would pay annual fees of as much as $4800; an identical truck that confined its business to one State but traveled the same number of miles and made the same number of trips would pay only $100. As a consequence, it is inevitable that flat levies like the Michigan tax "'bear much more heavily in the aggregate on a firm that sells in many places than on a firm otherwise identical * * * that sells in only one place.'" *Scheiner*, 483 U.S. at 285 n.20 (quoting Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1188 (1986)).

With this principle in mind, one of the leading commentators in this area has explained that

> the imposition of *any* unapportioned flat state or local tax on a multistate business would appear to be vulnerable to attack under the "internal consistency" doctrine * * * This conclusion follows inexorably from a simple application of the "internal consistency" principle. If every state were to impose an unapportioned flat tax on business activities in which both intrastate and interstate enterprises engage, the interstate business would pay the tax in each state in which it did business, whereas its intrastate competitor would pay but a single tax in the state in which it did business. Because the tax is not apportioned to the activity carried on in the state, the interstate enterprise would bear a heavier tax burden than its intrastate competitor merely because it was engaged in interstate commerce — a paradigmatic "impermissible interference with free trade."

Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 153-154 (1988) (quoting *Armco*, 467 U.S. at 644) (emphasis in original; footnote omitted). See also *Scheiner*, 483 U.S. at 303-304 (Scalia J., dissenting) (the internal consistency principle as stated by the Court requires the invalidation of "any unapportioned flat tax on multistate activities"); *Tyler Pipe*, 483 U.S. at 254 (Scalia, J., dissenting) (same).[6]

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[6] Many courts have invoked *Scheiner* to invalidate flat state taxes or fees. See, *e.g.*, *Trailer Marine Transp. Corp.* v. *Rivera*

Here, the Michigan tax plainly fails the internal consistency test: it is a flat, unapportioned levy that is imposed on interstate trucks whenever a portion of their trip has an intrastate component in Michigan. If replicated by other states, such a tax would impose crushing burdens on trucks traveling in interstate commerce. Indeed, in its practical effect the Michigan tax is *more* pernicious than the one invalidated in *Scheiner* because it penalizes interstate carriers who choose to compete with local truckers for intrastate business in Michigan. Under the Michigan tax regime, local and interstate businesses pay the same amount for a privilege that is inherently more valuable to the local company – a reality that will either put interstate carriers at a competitive disadvantage or induce those carriers to abandon the Michigan market altogether, to the benefit of the local trucking industry. By the same token, because Michigan truckers would run the risk of subjecting themselves to intrastate fees imposed by other states were they to cross state lines, the Michigan tax also certainly "tends, at least, to discourage domestic corporations from plying their trades in interstate commerce." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 333 (1996).[7]

Vazquez, 977 F.2d 1 (1st Cir. 1992) (invalidating flat annual fee used to support no-fault insurance fund); *Kentucky Transp. Cabinet* v. *American Trucking Ass'ns*, 746 S.W.2d 65, 67 (Ky. 1988) (invalidating flat highway privilege tax); *Black Beauty Trucking, Inc.* v. *Indiana Dep't of State Revenue*, 527 N.E.2d 1163, 1165 (Ind. Tax 1988) (invalidating flat highway privilege tax); *American Trucking Ass'ns, Inc.* v. *Goldstein*, 541 A.2d 955, 957-958 (Md. 1988) (invalidating flat fuel tax registration fee); *American Trucking Ass'ns* v. *State*, 556 N.W.2d 761 (Wis. Ct. App. 1996) (invalidating flat hazardous waste transportation fee), rev. denied, 560 N.W.2d 274 (Wis. 1996); *American Trucking Ass'ns* v. *Conway*, 566 A.2d 1335, 1337-1338 (Vt. 1989) (invalidating flat fuel-user license fee).

Writing for the Court in the leading case of *Nippert* v. *City of Richmond*, 327 U.S. at 429, Justice Rutledge[8] described the practical consequences of such a flat tax:

> [The] tax imposes substantial excluding and discriminatory effects of its own. * * * [T]he small operator and especially the casual or occasional one from out of the State will find the tax not only burdensome but prohibitive, with the result that the commerce is stopped before it is begun. And this effect will be extended to more substantial and regular operators, particularly those whose * * * market in any single locality * * * cannot be mined more than once every so often.

Justice Rutledge added that interstate businesses inevitably "would find the cumulative burden of the [flat] tax eating away all possible return from [their] selling." *Id.* at 430. Such a tax thus "can easily mean the stoppage of a large amount of commerce which would be carried on either in the absence of the tax or under the incidence of one taking account of those

[7] As the Court has indicated on repeated occasions, for purposes of applying the internal consistency test it does not matter whether other taxing jurisdictions actually have enacted identical taxes; the test looks at the consequence if such taxes *were* to be enacted. See, *e.g.*, *Scheiner*, 483 U.S. at 283 n.15; *Tyler Pipe*, 483 U.S. at n.11.

[8] Justice Rutledge's views anticipated the Court's modern Commerce Clause doctrine in significant respects and were substantially incorporated in the *Complete Auto Transit* test. See *Complete Auto Transit*, 430 U.S. at 280-281, 282; Rothfeld, *Mail-Order Sales and State Jurisdiction to Tax*, 1 STATE TAX NOTES 581, 586, 587 (1991).

variations." *Id.* "Whether or not it was so intended, those are [the flat tax's] necessary effects." *Id.* at 434.[9]

Needless to say, then, Michigan's tax manifestly does *not* "maintain state boundaries as a neutral factor in decisionmaking." *Scheiner*, 483 U.S. at 283. Such an outcome is precisely what the Commerce Clause nondiscrimination and apportionment requirements were designed to avoid.[10]

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[9] This is a very realistic concern. See, *e.g.*, *Gov't Suppliers Consol. Servs., Inc.* v. *Bayh*, 975 F.2d 1276, 1281 (7th Cir. 1992) ("for trucks that haul [in the taxing state] only once a year, [a] $100 registration fee may be prohibitive"); *Oregon*, 90 P.3d at 22 ("the flat fee option will both exert pressure on the interstate carrier to change its operations to focus on intrastate business and will discriminate against the interstate carrier if it does not do so"). Indeed, in its brief supporting certiorari, the United States noted that "Congress's determination in the [Single State Registration System] that a fee exceeding $10 for interstate hauls would unduly burden interstate commerce suggests that a fee ten times that amount for 'topping off' an interstate load warrants review by this Court." Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 17.

[10] It is no answer to this point to suggest, as the State did below, that a carrier with a fleet of many trucks could avoid competitive disadvantage by dedicating a portion of its fleet exclusively to intrastate commerce in Michigan. As this Court has held repeatedly, "such promotion of in-state markets at the expense of out-of-state ones furthers the 'economic Balkanization' that our dormant Commerce Clause jurisprudence has long sought to prevent" (*Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 333 n.3 (1996)); a state may not impose "a tax which is 'discriminatory in favor of the local merchant'" so as to "encourag[e] an out-of-state operator to become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 72 (1963) (citation omitted). Moreover, the approach suggested by the State simply is not practical. An out-of-state carrier with many trucks cannot know in advance which vehicles will be in position to take advantage of the opportunity to make an intrastate haul in Michigan; a carrier that hopes to get intrastate business as that business becomes available will have no choice but to register all of its trucks in Michigan – and in all other states that adopt similar intrastate fees.

2. *The Michigan tax falls on interstate trucks at a higher effective rate per mile than it applies to trucks that travel only intrastate*

Flat taxes like Michigan's do more than impose cumulative burdens on firms that conduct business in multiple states; they also necessarily discriminate against interstate firms even on the intrastate portion of their business. While the flat tax nominally applies in the same amount to inter- and intrastate businesses, "[t]he Commerce Clause has a deeper meaning that may be implicated even though state provisions * * * do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory." *Scheiner*, 483 U.S. at 281. More than fifty years ago, in *Nippert*, the Court described why this is so. Striking down a flat municipal license fee imposed on solicitors doing business in the city, the Court explained:

> [T]he tax * * * cannot be taken to apply generally to local distributors in the same manner and with like effects as in application to out-of-state distributors. The very difference in locations of their business headquarters, if any, and of their activities makes this impossible. This, of course, is but another way of saying that the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application between those two classes of commerce, generally speaking, impossible.

327 U.S. at 432.

The Court applied this conclusion to taxes on interstate motor carriers in *Scheiner*, noting that flat taxes necessarily disadvantage interstate businesses: "[T]he very nature of the market that interstate operators serve prevents them from making full use of the privilege * * * for which they have paid the State" a flat fee. 483 U.S. at 284 n.16. Thus,

> "the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego [*sic*] the privilege some of the time simply because of its interstate character, i.e., because it operates in other States as well. In the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier."

Id. at 291 (quoting *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting)).

Against that background, the discriminatory impact of a flat levy like the Michigan tax is undeniable. On average, a trucking company that confines its operations to intrastate travel will drive far more miles within the taxing state and will obtain a vastly greater benefit from its intrastate fee than will an otherwise identical company that travels both intra- and interstate. Such a local company therefore will pay the tax at a lower effective rate than does its interstate competitor. And "imposition of [a] flat tax[] for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause. The great constitutional purpose of the Fathers cannot be defeated by using an apparently neutral 'guise of taxation which produces the excluding and discriminatory effect.'" *Scheiner*, 483 U.S. at 296 (quoting *Nippert*, 327 U.S. at 426).

Thus, as the United States noted in supporting the grant of certiorari in this case, concerns similar to those raised by the flat taxes invalidated in *Scheiner*

> may be raised by Michigan's intrastate fee under Section 278.2(1) insofar as it is imposed on carriers engaged in interstate as well as intrastate commerce, because the cost-per-mile incurred by those carriers for engaging in intrastate commerce within Michigan would generally be higher than the cost-per-mile incurred by wholly intrastate carriers for engaging in the same commerce. * * * The effect could be to place interstate carriers at a competitive disadvantage if they sought to "top off" an interstate load or haul a load between two points in Michigan after completing (or before commencing) an interstate haul. The carrier's interstate transportation could also be adversely affected as a result.

Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 16. A tax regime in which interstate businesses are thus "placed at a substantial commercial disadvantage" (*West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 195 n.11 (1994)) is inconsistent with the Commerce Clause.

C. The Court Below Misapplied The Controlling Commerce Clause Principles

In nevertheless upholding the Michigan tax, the court below regarded the substantial body of this Court's Commerce Clause tax jurisprudence as wholly inapposite. That is so, the court of appeals reasoned, because levies used to support regulatory programs (as Michigan's ostensibly is) should be subjected to a much lower standard of Commerce Clause review than are other forms of state taxation. The court also was of the view that state taxes will survive Commerce Clause scrutiny in the absence of empirical proof that the levies actually have *succeeded* in suppressing interstate commerce. Both elements of this analysis are insupportable.

1. A levy may not escape application of the Complete Auto test simply because its proceeds are used for regulatory purposes

In upholding the constitutionality of the Michigan tax, the court below did not attempt to reconcile its decision with the mandate of holdings like *Scheiner* and *Nippert*. Instead, the court held that a tax simply need not satisfy the *Complete Auto Transit* requirements and the internal consistency test at all so long as it is "regulatory" in nature. The Michigan tax is "regulatory," the court had earlier concluded, because its proceeds are devoted to "promoting and regulating safe use of the highways" and the aggregate amount of the fees collected is "proportionate to the cost of the regulation." J.A. 93-94. See also note 5, *supra*. Having thus characterized the levy here as "regulatory," the court of appeals rejected the *Complete Auto Transit* test and concluded that the applicable standard is the one set forth in *Pike* v. *Bruce Church* for assessing the validity under the Commerce Clause of nondiscriminatory regulations.

This holding, however, rests on a manifest evasion of this Court's precedents. Whatever the validity of a Commerce Clause distinction between taxes and regulations, we would have thought it obvious that a tax whose revenues are dedicated to paying for the enforcement of a regulation is just that: a tax and *not* a form of regulation. This surely is a place for application of the "quacks like a duck" principle; the Michigan court's contrary conclusion, which accords taxes differing constitutional treatment depending upon what they are called and what they pay for, "has no relationship to economic realities" and "focus[es] on [a] formalism [that] merely obscures the question whether the tax produces a forbidden effect." *Complete Auto Transit*, 430 U.S. at 279, 288.

It therefore is no surprise that the Michigan court's decision to hinge the constitutionality of the tax on the uses to

which the tax revenue will be put departs from this Court's holdings in several fundamental respects:

a. To begin with, the court below disregarded the undeniable fact that the Michigan tax's effect on interstate commerce is essentially identical to that of the tax invalidated in *Scheiner*. In both cases the flat levies, if imposed by other states, would have a "'cumulative effect'" on interstate trucks that would "'not result from the mileage or distance traveled, but from the interstate character of the journey. The same mileage in one state would result in only one tax.'" *Scheiner*, 483 U.S. at 285 n.16 (quoting Lockhart, *State Tax Barriers to Interstate Trade*, 53 HARV. L. REV. 1253, 1269 (1940)). In both cases the interstate vehicle paid for something that "'[i]n the general average of instances * * * is not as valuable to the interstate as to the intrastate carrier.'" *Id.* at 291 (citation omitted). And in both cases the effect of the tax was to "exert an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.* at 283, 286-287 (quoting U.S. Const., Art, I, § 8, cl. 3). Like the levy in *Scheiner*, the Michigan tax accordingly "produce[d] a forbidden effect" (*Complete Auto*, 430 U.S. at 288) – and that is the crucial consideration for Commerce Clause purposes.

Thus, as Professor Hellerstein has observed,

> there is no reason to believe that a regulatory license fee would be immune from the "internal consistency" requirement merely because it constituted an exercise of the state's regulatory power rather than an exercise of the state's taxing power. Surely the evils that the "internal consistency" test was designed to combat are the same regardless of whether the unapportioned flat levy is an exercise of the tax power or the regulatory power. In each case, the licensee carrying on his trade in more than one jurisdiction bears a greater financial burden than his in-

> trastate competitor merely because he is engaging in interstate commerce with the consequent interference with free trade among the states. Hence there does not appear to be any sound policy basis for distinguishing the "fee" from the "tax" cases insofar as the application of the "internal consistency" doctrine is concerned.

Hellerstein, *supra*, 87 MICH. L. REV. at 157. See *American Trucking Ass'ns* v. *Secretary of Administration*, 613 N.E.2d 95, 99 n.9, 102 (Mass. 1993) (noting that "[i]t is of no relevance what label is attached to the assessment imposed by the State" so long as the fee has "an impermissible effect on free trade" and finding "no merit to the Commonwealth's claim that the internal consistency test does not apply to user fees"); *American Trucking Ass'ns* v. *Secretary of State*, 595 A.2d 1014, 1016 (Me. 1991) ("a tariff * * * is forbidden if it produces the prohibited discriminatory effects on interstate commerce whether designated a 'fee' or a general revenue 'tax'"); *American Trucking Ass'ns, Inc.* v. *State of New Jersey*, 852 A.2d 142, 164 (2004) ("reject[ing] the State's contention that as long as a 'flat fee' is a 'regulatory user fee,' it is not subject to the four-prong test of *Complete Auto Transit*"); *id.* at 158 (citation omitted) ("'[i]t is the 'practical effect of the challenged tax' that is determinative"). See also *Gov't Suppliers Consolidating Servs., Inc.*, v. *Bayh*, 975 F.2d 1276, 1271 n.2, 1281-1282 (7th Cir. 1992) (striking down flat fees on trucks engaged in waste transportation and collection even though the fees' "purpose [was] regulatory"), cert. denied, 506 U.S. 1053 (1993).

b. Moreover, the distinction drawn by the Michigan court – between a tax whose revenues are used "to enforce [regulatory] provisions" and a tax "designed to raise revenue for the general public" (J.A. 93) – makes no sense when applied to the Commerce Clause. For reasons we have just noted, the burden on interstate commerce is not reduced in any respect because the tax revenues are used to finance regulatory activity rather than, for example, highway repairs. Again, *Scheiner* provides an illustration of the point. The taxes there were imposed on all trucks that traveled Pennsylvania's roads and were dedicated to financing "road-related expenditures," including "highway maintenance." 483 U.S. at 270, 271. The burden that those taxes imposed on interstate trucks would not have been reduced (or affected in any way) if the revenues instead had been devoted to paying for safety inspections, sobriety checks, highway patrol salaries, or any other arguably more "regulatory" activity. Indeed, such a "regulatory fee" would, if anything, appear to be more burdensome than a general revenue tax because it would be part of a package that subjected trucks to a double whammy: the trucker would both pay the tax and bear the burden of potentially costly state regulation.

Again, the United States had it right in its brief supporting certiorari:

> What matters is "not the formal language of the tax statute but rather its practical effect." [*Jefferson Lines*, 514 U.S. at 183.] In substance and effect, the distinction drawn by the Court of Appeals is meaningless: the intrastate fee is in effect a tax "for the privilege of doing business in the state" because an interstate carrier cannot make intrastate hauls in the State without paying the fee; whether the fee is characterized as "regulatory" has no bearing on its practical effect.

Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 13-14.[11]

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[11] This is not to deny, of course, that there may be circumstances in which there are relevant distinctions between general revenue taxes and special purpose fees. Some statutes, for example, accord differing treatment to the two types of levy. See, *e.g.*, *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974) (ad-

c. In addition, flat taxes like the ones at issue here and in *Scheiner* are quite different from per-use fees, such as highway tolls, that have survived Commerce Clause attack. The latter type of fee is neither malapportioned nor discriminatory because it is calibrated to charge every user for each use of a particular service provided to the taxpayer (or to compensate the State for every expense imposed upon the State by the taxpayer). In the highway toll example, the traveler who takes ten trips on the highway will pay the toll ten times, while the traveler who passes through once will pay only a single toll; in-state travelers have no special advantage because the fee "'is based on some fair approximation of use or privilege for use.'" *Scheiner*, 483 U.S. at 289 (quoting *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716-717 (1972)).

Here, the Michigan court opined that the tax at issue is "proportionate to the cost of regulation" (J.A. 94) – but it meant by this statement that fee revenue *in the aggregate* is used to pay for the State's regulatory program. See *id.* at 95. As with the Pennsylvania fees invalidated in *Scheiner*, the amount of Michigan flat tax "owed by a trucker does not vary directly with miles traveled or with some other proxy for value obtained from the State." 483 U.S. at 291. By definition, such a fee, which does not take account of in-state mileage or number of trips taken, cannot reflect a reasonable approximation of the individual taxpayer's use of state services, and thus does "not even purport to approximate fairly the cost or value of the use of [the State's] roads." *Id.* 290. See *id.* at 286 n.21; *Nippert*, 327 U.S. at 427; Choper & Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193, 232-233.

d. Finally, the line drawn by the court below makes inconsistency in application inevitable. Because that line is not grounded in Commerce Clause policies, there is no principled way to determine whether a given tax must be deemed a "regulatory fee." In this case, for example, the Michigan court declared the challenged tax to be regulatory because its proceeds ostensibly are used to "promot[e] and regulat[e] safe use of the highways." J.A. 93. But this approach makes the form of the tax dispositive and invites manipulation by legislative draftsmen – a danger that is particularly acute because the court below used a *state-law* test to determine whether a levy is a "fee" and therefore exempt from the *Complete Auto* requirements.[12] As a consequence, the Michigan court's holding would allow States to pay for a wide range of activities through the imposition of flat fees, in the process exporting much of their tax burden to out-of-state

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dressing whether a particular charge is a "fee" within the meaning of the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a, revised and recodified at 31 U.S.C. § 9701); *Union Pac. R.R. Co.* v. *Public Util. Comm'n*, 899 F.2d 854 (9th Cir. 1990) (addressing whether a particular levy is a "tax" within the meaning of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503(b), recodified at § 11501). But these decisions have no bearing on the question whether the purposes of the Commerce Clause permit the drawing of a similar distinction between taxes and fees. See Rothfeld, *Scheiner's Next Wave: Distinguishing Taxes From Fees Under the Commerce Clause*, 17 STATE TAX NOTES 1681, 1686 (1999).

[12] The bankruptcy of this approach is illustrated by the fact that the regulatory program assertedly served by the Michigan tax underwent a radical change in 1995, when Congress preempted state regulation of the prices, routes, and services of intrastate trucking operations. See note 2, *supra*. As the court below itself noted (J.A. 93 n.10), federal law thus displaced most of the purposes served by the Michigan regulatory program pursuant to which the Michigan tax is assessed. Michigan, however, has not adjusted the amount of the fee collected. As this history suggests, it is a simple enough matter for a state to change the asserted "regulatory" justification for a fee when doing so suits its purpose.

taxpayers. The inevitable consequence of such a rule would be to "divide and disrupt the market for interstate transportation services." *Scheiner*, 483 U.S. at 285.

2. *There is no need for an empirical demonstration that the flat tax discourages interstate commerce*

The decision below also departs from the analysis used by this and other courts in a second respect: the Michigan court erred in failing to recognize the discriminatory nature of the Michigan tax. The court below recognized that it "may be" that "the mixed [inter- and intrastate] carrier invariably will pay a higher per mile fee than the carrier who operates solely intrastate," and "that because the fee is a flat annual fee, in order to receive the greatest benefit for the fee, a carrier would need to maximize its intrastate operations and this could potentially affect a carrier's economic decision-making by discouraging an intrastate carrier from engaging in interstate commerce." J.A. 100-101. Having said that, however, the court rejected the claim of discrimination on the ground that "it is a matter of pure speculation," reasoning that it saw no evidence that in practice "the fee raises a significant barrier to participation in interstate trade. Any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination." *Id.* at 101. This holding, however, "entirely misconceive[s] what is meant by discrimination or undue burden in the sense applicable to these problems." *Nippert*, 327 U.S. at 426.

The assertion that the discrimination did not actually succeed in discouraging interstate commerce (even if, improbably, it is assumed to be true) cannot validate a discriminatory tax. "It is well-settled that '[w]e need not know how unequal the [t]ax is before concluding that it unconstitutionally discriminates.'" *Bacchus Imports, Ltd* v. *Dias*, 468 U.S. 263, 269 (1984) (quoting *Maryland* v. *Lousiana*, 451 U.S. 725, 760 (1981)). The Court thus has held repeatedly that, "[o]nce

a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." *Chemical Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 342 (1992). See, *e.g.*, *Oregon Waste Sys.*, 511 U.S. at 101. The extent of the discrimination is immaterial so long as a state tax structure "tends, at least, to discourage domestic corporations from plying their trades in interstate commerce" or to discourage interstate companies from competing for local business; the Court has "never recognized a 'de minimis' defense to a charge of discriminatory taxation under the Commerce Clause." *Fulton Corp.*, 516 U.S. at 333 & n.3.

Indeed, in upholding claims that state taxes or regulations violate the Commerce Clause's anti-discrimination requirement, the Court has expressly *rejected* the contention that the plaintiff must show an actual adverse effect on interstate commerce. Thus, "[a] particularized showing of the sort respondent[s] seek[] is not required" (*Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 581 n.15 (1997)), and that is so even if the affected entities "are not deterred by the statute from doing a principally interstate business." *Id.* at 578. See, *e.g.*, *Bacchus Imports*, 468 U.S. at 271.[13] Indeed, so far as internal consistency is concerned, the test "asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure

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[13] For these reasons, the United States was incorrect when it suggested, in its brief supporting the grant of certiorari, that the Court consider remanding the case for factual development concerning "the extent of any such competitive disadvantage on interstate commerce." Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 17 & 17 n.11 (suggesting possibility of a remand because the record does not "reflect the overall extent to which Michigan's flat fee actually deters out-of-state carriers from competing for intrastate hauls in Michigan"). In the face of discrimination, the Court has never deemed such proof to be necessary.

of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a competitive disadvantage as compared with commerce intrastate. A failure of internal consistency shows *as a matter of law* that a State is attempting to take more than its fair share of taxes." *Jefferson Lines*, 514 U.S. at 185 (emphasis added).

By the same token, when the structure of a flat tax necessarily discriminates against interstate businesses "'[i]n the general average of instances'" (*Scheiner*, 483 U.S. at 291 (citation omitted)), there is no need for particularized proof of the per-mile or per-transaction disparity in the effective rates imposed on inter- and intrastate taxpayers. In *Nippert*, for example, no such evidence was required. For, as the Supreme Judicial Court of Massachusetts explained in a case that was virtually identical to this one, "[a]lthough the discriminatory impact of the fees is not precisely quantifiable because the stipulated facts do not include statistics regarding the average number of miles traveled annually in Massachusetts by local trucks and by those registered in other jurisdictions, it is intuitively obvious that local trucks derive far greater economic benefit from each of the challenged fees paid than do interstate trucks." *American Trucking Ass'ns, Inc.* v. *Sec'y of Administration*, 613 N.E.2d at 101. Accord *American Trucking Ass'ns, Inc.* v. *State of New Jersey*, 852 A.2d at 163 (flat fees are "structurally discriminatory, and [interstate carriers] should not be compelled to prove the precise level of the per-activity cost disparity"); *American Trucking Ass'ns, Inc.* v. *Oregon*, 90 P.3d at 22 ("In deciding this kind of issue, the Supreme Court's case law does not rely on the specific evidence in a specific case as the foundation for its conclusions concerning a particular tax. Rather, it focuses on the structure of the tax at issue[.]"); *id.* at 23 ("the [Supreme] Court has * * * made it clear that it is the inherent tendency of a tax,

not the effects that the tax has actually produced, that matters for the 'internal consistency' test").[14]

D. The Michigan Tax Is Not Subject To A Special Commerce Clause Rule Because It Purports To Fall On An Intrastate Transaction

The conclusion that the court below erred in its analysis would appear to dispose of this case. But one additional issue, raised by the United States in its brief in support of certiorari, warrants discussion. Pointing to *Osborne* v. *Florida*, 164 U.S. 650 (1897), and *Pullman Co.* v. *Adams*, 189 U.S. 420, 422 (1903), the United States suggested that "an older line of this Court's cases * * * subjected flat taxes on transportation companies' intrastate routes to more relaxed scrutiny than taxes on their interstate routes." Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 15. The United States broached the possibility that those decisions provide support for Michigan's contention that flat taxes on intrastate commerce are defensible, although the Solicitor General acknowledged that "[t]he continued vitality of those older decisions may be subject to question in light of this Court's decisions in *Complete Auto* and *Scheiner*, which overruled a number of earlier formalist decisions in favor of a more practical framework focusing on the actual effect of a tax." *Id.* at 16. In our view, the doctrine

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[14] See also *Black Beauty Trucking, Inc.* v. *Indiana Dept. of State Revenue*, 527 N.E.2d 1163, 1165 (Ind. Tax 1988) ("[t]he discriminatory impact [of a flat tax] on the interstate carrier is readily apparent"); *American Trucking Ass'ns* v. *Goldstein*, 541 A.2d 955, 957 (Md. 1988) (deeming it sufficient that "interstate carriers[] might tend to travel fewer miles in Maryland and thus pay a higher per-mile price"); *American Trucking Ass'ns* v. *Conway*, 566 A.2d 1335, 1337 (Vt. 1989) (concluding that *Scheiner* held "flat highway user taxes inherently discriminatory against interstate commerce").

and decisions cited by the United States cannot support the Michigan tax.

1. At the time that it decided *Osborne* and *Pullman Co.* – and, with occasional exceptions, for most of the next seven decades – the Court applied what it has since described as a "somewhat metaphysical approach to the Commerce Clause that focused on the character of the privilege [taxed] rather than the practical consequences of the tax." *Scheiner*, 483 U.S. at 294-295. During this period, "the Court held the view that interstate commerce was wholly immune from state taxation 'in any form,' * * * even though the same amount of tax should be laid on intrastate commerce." *Jefferson Lines*, 514 U.S. at 180 (citation omitted). See *id.* at 181, 183. See, *e.g.*, *Armco*, 467 U.S. at 643 n.7 (noting "the now rejected notion that only 'direct' burdens on interstate commerce were disapproved"). As a corollary to this doctrine, "at a time when the Commerce Clause was thought to prohibit the States from imposing any direct tax on interstate commerce," "the distinction between intrastate activities and interstate commerce was crucial to protecting the States' taxing power." *Commonwealth Edison*, 453 U.S. at 614-615. Although the Court used different semantic formulations to draw this line, its central view during the late nineteenth and much of the twentieth centuries accordingly was that state taxation of "local" or intrastate activities was wholly unconstrained by the Commerce Clause, while interstate commerce "itself" was absolutely immune from state taxation. See Lockhart, *supra*, 65 MINN. L. REV. at 1027-1034; Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37 (1987); McCray, *Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation*, 17 URB. LAW. 529, 538-551 (1985); Rothfeld, *supra*, 1 STATE TAX NOTES at 586-587.

Over time, however, the Court came to recognize that this approach was "a triumph of formalism over substance"

(*Complete Auto Transit*, 430 U.S. at 281), and in a series of decisions culminating in *Complete Auto Transit* the Court "categorically abandoned" the test drawing semantic distinctions between local and interstate activities. *Jefferson Lines*, 514 U.S. at 183. See, *e.g.*, *D.H. Holmes Co.* v. *McNamara*, 486 U.S. 24, 30 (1988). In the place of this formal rule, as we have noted, the Court substituted an approach that "seek[s] to 'establish a consistent and rational method of inquiry focusing on the practical effect of the challenged tax.'" *Goldberg* v. *Sweet*, 488 U.S. 252, 260 (1989).

Under the practical approach of *Complete Auto Transit*, the Court has, on the one hand, rejected "the notion that state taxes levied on interstate commerce are per se invalid." *Commonwealth Edison*, 453 U.S. at 615. But sauce for the goose is sauce for the gander: even while recognizing broader state authority to tax nominally *interstate* transactions, the Court also has "rejected any suggestion that a state tax or regulation affecting interstate commerce is *immune* from Commerce Clause scrutiny *because it attaches only to a 'local' or intrastate activity*." *Commonwealth Edison*, 453 U.S. at 615 (emphasis added) (citing cases). Instead, the Court has held that "[s]tate taxes levied on a 'local' activity * * * may substantially affect interstate commerce, and this effect is the proper focus of Commerce Clause inquiry." *Id.* at 616. Such a tax "must be evaluated under *Complete Auto Transit*'s four-part test." *Id.* at 617. Thus, "[e]ven when business activities are purely local, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Camps Newfound/Owatonna*, 520 U.S. at 573 (citations and internal quotation marks omitted). See *Scheiner*, 483 U.S. at 295-296.

This point is made clear by *Scheiner* itself. There, Pennsylvania imposed an unapportioned tax on trucks "for the privilege of using [the] State's highway system." 483 U.S. at 269, 279. That tax could have been defended on precisely the

"intrastate tax" ground noted by the United States (and advanced by Michigan) here: just as no other state may tax intrastate carriage in Michigan, no other state could have imposed a levy on the intrastate use of Pennsylvania's highways. See *id.* at 284 n.16; 293-294. But the Court nevertheless held the Pennsylvania tax invalid because unapportioned levies like Pennsylvania's, if imposed by other states on the (assertedly intrastate) use of *their* highways, would result in cumulative burdens on interstate commerce, placing interstate truckers at a potentially crippling competitive disadvantage. See *id.* at 284, 296. Michigan's unapportioned tax has exactly the same effect. And under the Court's modern view, for purposes of Commerce Clause analysis it is simply immaterial that this "pinch" on interstate commerce is triggered by an intrastate event. See Choper & Yin, *supra*, 1998 SUP. CT. REV. at 232 ("[F]lat taxes such as those in *Scheiner* present exploitative possibilities despite the fact that they are assessed against an object that only the taxing state can reach. * * * Because of this inherent structural prejudice for multistate enterprises, these types of flat taxes should be invalidated regardless of the state's intention in imposing them."). 2. Against this background, the decisions cited by the United States at the certiorari stage do not provide substantial support for the Michigan tax. Those cases were decided during the heyday of the Court's formal, "metaphysical" approach to the Commerce Clause, and their holdings provide no guidance for the resolution of this case.

Osborne involved a Commerce Clause challenge to a flat tax imposed by Florida and its political subdivisions on express companies that carried goods for hire. See 164 U.S. at 652-653. The Court "assumed that if the statute applied to the express company in relation to its interstate business, it would be void as an attempted interference with or regulation of interstate commerce." *Id.* at 653-654. The Florida Supreme Court, however, read the tax to apply "only as concerns [the taxpayer's] local business." *Id.* at 654. This Court upheld the tax as so construed, explaining that "[i]t has never been held * * * that when the business of the company which is wholly within the State, is but a mere incident to its interstate business, such fact would furnish any obstacle to valid taxation by the State of the business of the company which is entirely local." *Id.* at 655. Relying on *Osborne*, the Court in *Pullman Co.* upheld a similar flat Mississippi tax on railway cars that carried passengers from point to point within the State (see 189 U.S. at 421); because the taxpayer was not legally obligated to carry passengers on intrastate journeys, the Court reasoned that "[t]he company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." *Id.* at 422.

On the face of it, and even when viewed on their own terms, nothing in these decisions is inconsistent with our position in this case. We do not argue, as did the taxpayers in *Osborne* and *Pullman Co.*, that interstate activities are immune from properly apportioned and nondiscriminatory state taxation. And the taxpayers in those cases did not argue, as we do, that intrastate taxation must be apportioned when it has substantial effects on interstate commerce. Instead, their contention was that their intrastate transportation of goods and passengers should be regarded (in a "metaphysical" sense) as an aspect of their interstate business, and therefore as wholly outside the state's taxing authority. The Court's rejection of that argument on the ground that the taxpayers' intrastate operations were a "mere incident" to their distinct interstate business does not foreclose the very different argument made by the taxpayers here.

But that technical distinction between the cases is not the end of the matter: more fundamentally, the reasoning that underlay the decisions in *Osborne* and *Pullman Co.* cannot be squared with the Court's current doctrine. It is no longer "assumed" that a state tax is wholly void simply because it is

imposed on a "company in relation to its interstate business." And conversely, as we have explained, it also is no longer the case that state taxation is immune from Commerce Clause scrutiny simply because "the business of the [taxpayer] * * * is entirely local."[15] The formal, metaphysical approach to the Commerce Clause that took no account of the practical impact of the challenged tax on interstate commerce – and that dictated the outcome in *Osborne* and *Pullman Co.* – has been "categorically abandoned." *Jefferson Lines*, 514 U.S. at 183. That, doubtless, is why the Court has not cited either of those decisions in more than 50 years; they were last invoked by the Court in *Chicago* v. *Willett Co.*, 344 U.S. 574, 577, 581 (1953).[16] Accordingly, if the holdings of *Osborne* and *Pull-*

[15] The analysis in *Pullman Co.* also is inconsistent with modern doctrine in a related respect. The Court reasoned there that ["[t]he company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." 189 U.S. at 422. That reasoning would appear to justify any discriminatory tax on intrastate operations that the taxpayer is not legally obligated to perform. But the Court has more recently made clear that a state may not "force a taxpayer" to restructure its operations or conduct a higher percentage of its business in-state "in order to avoid discriminatory taxation." *Kraft Gen. Foods, Inc.* v. *Iowa Dept. of Revenue & Finance*, 505 U.S. 71, 78 (1992).

[16] The other creaky decisions cited in the United States' brief at the certiorari stage likewise cannot justify the Michigan tax. See Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 15 n.9. The Court's cryptic discussion in *Bode* v. *Barrett*, 344 U.S. 583, 583 (1953), appears to reflect the discredited view that a tax on intrastate operations necessarily does not impose an "unreasonable burden on interstate commerce." And in *Willett*, the Court upheld an Illinois truck tax on the ground that the taxpayer was an Illinois corporation that based its trucks in Chicago (see 344 U.S. at 580); whatever the current vitality of that holding, it has no application in this case, in which the taxpayers and their fleets are not headquartered in Michigan.

man Co. are thought to support the constitutionality of the Michigan tax, those holdings should be disapproved.[17]

Indeed, if the Court were to hold that some category of taxes on intrastate events is immune from Commerce Clause scrutiny and the *Complete Auto Transit* test – even though, as in this case, those taxes undeniably have an effect on interstate commerce – it would be required to draw the sort of "opaque" distinctions that led to repudiation of the formal nineteenth century rule in the first place. *Commonwealth Edison*, 453 U.S. at 616 n.6. After all, as Justice Rutledge has noted for the Court, "[a]ll interstate commerce takes place within the confines of the States and necessarily involves 'incidents' occurring within each State through which it passes or with which it is connected in fact." *Nippert*, 327 U.S. at 423. Thus,

> [i]f the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate or distinct from "the transportation or intercourse which is" the commerce itself and then to levy the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is

[17] As the Solicitor General noted, the Court has not hesitated to disapprove Commerce Clause decisions that are inconsistent with modern doctrine. See, *e.g.*, *Fulton Corp.*, 516 U.S. at 346 (disapproving *Darnell* v. *Indiana*, 226 U.S. 390 (1912)); *Scheiner*, 483 U.S. at 296-297 (disapproving *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950), *Aero Mayflower Transit Corp.* v. *Board of Railroad Commissioners*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n*, 295 U.S. 285 (1935)); *Complete Auto Transit*, 430 U.S. at 288-289 (disapproving *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951)).

> difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of the tax.

Ibid. The Court rejected a rule that invited such baroque distinctions once, and it should not revive that rule now by upholding the Michigan tax.

CONCLUSION

The judgment of the Michigan Court of Appeals should be reversed.

Respectfully submitted.

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Nos. 03-1230 and 03-1234

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In The
Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.
AND USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

MID-CON FREIGHT SYSTEMS, INC., *et al.*,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF FOR PETITIONERS MID-CON FREIGHT SYSTEMS, INC., *et al.* No. 03-1234

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QUESTION PRESENTED

For nearly forty years, Congress has imposed express limitations on State registration of interstate motor carriers and their vehicles. In 1991, Congress directed the Interstate Commerce Commission ("ICC") to implement a new uniform program called the Single State Registration System ("SSRS") under which each interstate motor carrier registers annually with just one State, and each State may only charge a per-truck fee "equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. § 14504(c)(2)(B)(iv)(III). Congress also found that "[t]he charging or collection of any fee under this section that is not in accordance with th[is] fee system . . . shall be deemed to be a burden on interstate commerce." 49 U.S.C. § 14504(c)(2)(C).

Michigan is a member of the SSRS and requires all interstate carriers to register annually with the Michigan Public Service Commission ("PSC") before operating on Michigan highways. However, if an interstate carrier uses trucks with license plates purchased from the Michigan Secretary of State, the PSC waives the normal $10 fee and substitutes in its stead a $100 decal fee for each truck registered each year. Notwithstanding the $10 fee cap of 49 U.S.C. § 14504(c)(2)(B)(iv)(III), the Michigan Court of Appeals upheld Michigan's $100 fee based on the notion that so-called "regulatory fees" are not preempted by the SSRS.

Against that backdrop, this Court has posed the following question: Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U.S.C. § 14504.

RULE 24.1(b) STATEMENT

Parties to the proceedings below were as follows: (a) As plaintiffs, Mid-Con Freight Systems, Inc.; Lafond Express, Inc. f/k/a Elex, Inc.;[1] Westlake Transportation, Inc.; Gerig's Trucking & Leasing, Inc.; Bestway Express, Inc.; Van Der Kooi Carriers, Inc.; Prism, Inc.; El Toro, Inc.; Myriah, Inc.; Troy Cab, Inc.; Deeco Services, Inc. d/b/a Deeco Transportation; Frank Tiberio d/b/a Fairfield Towing; Dale Constine & Sons, Inc.; Calcut Sales & Services, Inc. d/b/a Calcut Trucking Company; Ambassador Transportation, Inc.; Hawkins Steel Cartage, Inc.; JLH Transfer, Inc.; H&H Enterprises, Inc. d/b/a S&M Cartage; Central Transport, Inc.; Bancroft Trucking Co.; U.S. Truck Co., Inc.; West End Cartage, Inc.; Central Cartage Co.; CTX, Inc.; Mohawk Motor of Michigan, Inc.; Economy Transport, Inc.; McKinlay Transport, Inc. Ltd.; Mason & Dixon Lines, Inc.; Universal Am-Can, Ltd.; Romeo Expeditors, Inc.; Tom Thumb Services, Inc. d/b/a Rei; O-Jay Transport Company; J. Law Enterprises, Inc.; and Alliance of O-Jay Transport, Inc.; (b) as intervening plaintiffs, American Trucking Associations, Inc. and TNT Holland Motor Express, Inc.; and (c) as defendants, the Michigan Public Service Commission; the Michigan Department of Treasury; the Michigan Department of Commerce; the State of Michigan; the Commissioners and Chairman of the Michigan Public Service Commission; the Treasurer of the State of Michigan; and the Director of the Michigan Department of Commerce.

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[1] Prior to changing its corporate name, Lafond Express, Inc. appeared as "Elex, Inc." in the proceedings below.

RULE 29.6 STATEMENT

Petitioners, Mid-Con Freight Systems, Inc. and Lafond Express, Inc., have no parent companies and are not owned in any respect by any publicly-held entity.

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OPINIONS BELOW

The opinion of the Michigan Court of Appeals (J.A. 68-102) is reported as *Westlake Transportation, Inc. v. Michigan Public Service Comm'n*, 255 Mich.App. 589, 662 N.W.2d 784 (2003). The trial court rulings and the judgment of the Michigan Supreme Court denying leave to appeal are all unreported and are set forth in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 36-75.

JURISDICTION

The Michigan Court of Appeals decision was entered on March 11, 2003. The judgment of the Michigan Supreme Court denying Petitioners' timely application for leave to appeal was entered December 3, 2003. A petition for certiorari was filed February 26, 2004 and granted on January 14, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Supremacy and Commerce Clauses of the United States Constitution, Art. VI, cl. 2 and Art. I, § 8, cl. 3, provide in relevant part as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

> The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . .

The pertinent statutory provisions are reproduced at Pet. App. 76-88. The statute involved is 49 U.S.C. § 14504 ("Section 14504").

STATEMENT OF THE CASE

The decision below undermines the federal regulatory plan of the SSRS and slights Congress's plenary authority to regulate interstate commerce. In designing the SSRS, Congress expressly limited the per-truck fees State regulatory commissions may levy against interstate motor carriers and declared fees in excess of $10 per truck to be a burden upon interstate commerce. Nevertheless, the court below held that Michigan's PSC may exceed the federal fee cap by tenfold and evade preemption by calling its levy a "regulatory fee." That decision cannot be squared with the plain language of Section 14504 and is irreconcilable with Congress's preemptive purpose. The Michigan Court of Appeals ruling, therefore, should be reversed.

A. Federal Regulatory Background

As discussed in *Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36 (2002), the 1991 enactment of the Intermodal Surface Transportation Efficiency Act ("ISTEA")[2] amended longstanding federal law to create a new system known as the SSRS under which State regulatory agencies

[2] Pub. L. No. 102-240, 105 Stat. 1914 (1991).

are permitted to register interstate motor carriers operating within their borders. As it concerns the fees that may be charged in connection with such limited State regulation of interstate trucking, however, the SSRS is little different from its statutory predecessor. Controlling federal law has long preempted per-vehicle fees in excess of $10.

In 1965, Congress first directed the ICC to implement standards under which States could require motor carriers to prove the lawfulness of their interstate operations. Congress's purpose was to protect legitimate carriers from the "not only illegal but also manifestly unfair" competition of unauthorized truckers and to establish "uniformity of registration" because "registration requirements differ[ed] widely among the States" and could "impose undue burdens on carriers." H.R. Rep. No. 89-253 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2923, 2924-2925, 2929. The proposed Congressional registration standards permitted the States to (1) require evidence of the carriers' ICC operating authority; (2) compel the filing of proof of insurance; (3) demand the designation of service of process agents; and (4) register and identify motor vehicles operating under the carriers' authority. *Id.* at 2928. It was contemplated that the new standards would go into effect five years after their promulgation, and, "thereafter, State requirements in excess of those promulgated would constitute an undue burden on interstate commerce." *Id. See also* 49 U.S.C. § 302(b) (1970 ed.). By the time of the 1978 recodification of the Interstate Commerce Act, Congress had plainly stated the preemptive effect of the standards as follows:

> When a State registration requirement imposes obligations in excess of the standards, the part in

> excess is an unreasonable burden [on interstate transportation].

49 U.S.C. § 11506(b) (1988 ed.).[3]

The standards the ICC implemented, in accordance with Congress's directive, permitted State regulatory commissions to register and identify interstate motor carrier vehicles for a fee assessed on a per-vehicle basis. As proof of registration and identification, each State participating in the program issued what were known as "bingo stamps" for each vehicle, and the stamps were placed on vehicle-specific "bingo cards." *See Yellow Transportation*, 537 U.S. at 39; *National Ass'n of Regulatory Utility Comm'rs v. Interstate Commerce Comm'n*, 41 F.3d 721, 724 (D.C. Cir. 1994). During all years relevant to this case, the applicable ICC regulation always imposed a fee cap of $10 for each vehicle registered and each identification stamp issued. *See* 49 C.F.R. § 1023.33 (1991). Indeed, an historical review of the regulation from 1982 forward reveals that it remained unchanged until 1992 when the ICC began rulemaking proceedings to implement the SSRS.

In 1991, when Congress enacted the ISTEA, it also made broad changes to national transportation funding and regulation. Among the changes made was standardization of the International Registration Plan ("IRP"), a previously voluntary program by which an interstate

[3] Prior to the 1978 recodification, the statement read "[t]o the extent that any State requirements for registration of motor carrier certificates or permits issued by the Commission impose obligations which are in excess of the standards or amendments thereto promulgated under this paragraph, such excessive requirements shall, on the effective date of such standards, constitute an undue burden on interstate commerce." 49 U.S.C. § 302(b) (1970 ed.).

carrier purchases license plates for its vehicles from a single "base" State that collects, distributes, and apportions the other States' plating fees based on the carrier's mileage traveled in each State.[4] The ISTEA also dismantled the "bingo card" system and directed the ICC to streamline State registration of interstate carriers through implementation of the SSRS.

Like the "bingo card" system, the SSRS permits the registration of interstate operating authority, the filing of proof of insurance, and the designation of local agents. Under the SSRS, however, each interstate motor carrier is now required to register annually with only a "base" State – usually the State in which the carrier's principal place of business is located.[5] The "base" State then collects and distributes fees for all other States participating in the program through which the carrier operates. Further, the SSRS eliminated the "bingo stamp" system of registering and identifying vehicles and "capped the per-vehicle registration fee that participating States could charge interstate motor carriers." *Yellow Transportation*, 537 U.S. at 40.

Specifically, in Section 14504(c)(2)(B)(iii), Congress banned the use of truck decals and "any other means of

[4] H.R. Rep. No. 102-171(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 1526, 1576. Under the ISTEA, all States were given until September 30, 1996 to come into compliance with the IRP plating program. H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1823. Pursuant to 49 U.S.C. § 31704, a State that is not a participant in the IRP may not "establish, maintain, or enforce a commercial motor vehicle registration law that limits the operation of a commercial motor vehicle that is not registered under the laws of the State" if the vehicle is IRP plated in another state.

[5] 49 C.F.R. § 367.3.

registering or identifying specific vehicles operated by the carrier."[6] Congress then adopted the ICC's $10 per-vehicle fee cap by specifying that the SSRS fee system

> *shall . . . result[ ] in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991. . . .*

49 U.S.C. § 14504(c)(2)(B)(iv)(III) (emphasis supplied). Finally, Congress also declared that "[t]he charging or collection of *any* fee under this section that is not in accordance with the fee system established [herein] shall be deemed to be a burden on interstate commerce." 49 U.S.C. § 14504(c)(2)(C) (emphasis supplied).[7]

B. Michigan's Fee Structure

Michigan is a longstanding participant in the SSRS and the predecessor "bingo card" program. The Michigan Motor Carrier Act, which is administered by the PSC, prohibits all for-hire motor carriers from engaging in the

[6] Congress's action was originally codified at 49 U.S.C. § 11506 (1994 ed.), but was recodified in nearly identical form at 49 U.S.C. § 14504 effective January 1, 1996.

[7] In 1995, the ICC was abolished by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995). The Federal Highway Administration thereafter adopted the ICC regulations that implemented the SSRS. The regulations remain the same to this day, echoing Congress's determination that "[t]he charging or collection of *any* fee that is not in accordance with the fee system established above is deemed a burden on interstate commerce" and providing that, "[t]o the extent *any* state registration requirement imposes obligations in excess of those specified in this part, the requirement is an unreasonable burden on transportation. . . ." 49 C.F.R. § 367.4(g); (h) (emphasis supplied). The Federal Motor Carrier Safety Administration is now the agency with regulatory authority over the SSRS. 49 U.S.C. § 113(f)(1).

interstate transportation of property in Michigan "without first having registered with the [PSC] and paid the required registration and vehicle fees." Mich. Comp. Laws § 478.7(1). Consistent with the SSRS, Mich. Comp. Laws § 478.7(4) sets the statutory maximum fee levied for each registering interstate carrier at $10 per truck, per annum. Nevertheless, the interstate carriers Petitioners represent pay ten times that amount every year.

In practice, the PSC applies the $10 maximum fee of Mich. Comp. Laws § 478.7(4) only to interstate carriers using vehicles with license plates purchased outside Michigan. J.A. 24-25. If an interstate carrier happens to operate motor vehicles with license plates purchased from the Michigan Secretary of State, the PSC waives the federally-compliant $10 fee and substitutes in its stead a *$100* fee for each vehicle registered. J.A. 8; 24; 59. The $100 fee – referred to herein as the Interstate Decal Fee – is somewhat confusingly authorized by Mich. Comp. Laws § 478.2(2), which requires a $100 fee "for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce."[8]

[8] Michigan Comp. Laws § 478.2(2) is not a model of clarity in its ambiguous reference to "each vehicle . . . registered in this state" given that interstate motor carriers "register" vehicles by buying license plates and also "register" their operations under the SSRS. There is no dispute, however, that it is the interstate motor carrier using trucks with Michigan license plates that pays the $100 fee to the PSC. J.A. 8; 24; 59. In addition, the PSC has consistently represented that it waives the $10 fee when it charges carriers the $100 fee for Michigan-plated trucks. J.A. 59. *See also* J.A. 83 n.6 (citing *Schneider Nat'l Carriers, Inc. v. State*, 247 Mich.App. 716, 721, 637 N.W.2d 838, 840 (2001), *vacated on other grounds*, 468 Mich. 862, 659 N.W.2d 228 (2003)). According to a PSC representative, the "rationale" for the $100 fee is that "vehicles which are license plated in Michigan are based in Michigan, and

(Continued on following page)

Whether an interstate carrier pays $10 or $100 per truck, the PSC requires of all SSRS-registering carriers the same federally-authorized information (evidence of federal operating authority, proof of insurance, and name of service of process agent). J.A. 65-66. However, a footnote on the PSC's form for calculating the $10 SSRS payment directs Michigan-plated interstate carriers to complete an additional PSC form ("Equipment List Form P-344-T") for purposes of paying $100 per truck; registering each truck by make, model, and serial number; and obtaining an identifying decal for each. J.A. 67.[9] Likewise, if a carrier using Michigan-plated trucks registers under the SSRS with a participating State *other* than Michigan, the PSC *still* requires the carrier to file the Equipment List Form P-344-T together with its scheduling of vehicles and $100 per-truck fee payment in exchange for the identifying decal.[10]

Like all PSC fees imposed upon intrastate-operated motor carrier vehicles, both the $10 fee and the $100 Interstate Decal Fee are generally "placed to the credit of the [PSC]" and may be appropriated "to the [PSC] and the motor vehicle highway fund in such proportions as the legislature may determine," except that a designated portion of the $10 fee revenue must be deposited in the

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therefore have a greater utilization of the highways and services in Michigan than do vehicles plated in another state." J.A. 26.

[9] The Equipment List Form P-344-T may be viewed in the "motor carrier; all forms" section of the PSC's website address at <http://www.michigan.gov/mpsc> (viewed February 22, 2004).

[10] For example, if an interstate carrier registers under the SSRS in Ohio but uses leased motor vehicles that the lessor has plated in Michigan, the Ohio carrier must register the vehicles with the PSC and pay the $100 fee on each one.

Michigan Truck Safety Fund. Mich. Comp. Laws § 478.6; § 478.7(5). The PSC reports that all of its fee revenue for fiscal year 1993-94 was appropriated in varying amounts to various State commissions and departments, including the PSC itself, and generally used by those agencies for economic, insurance, and safety regulation of the Michigan trucking industry; safety education programs; and enforcement of the Michigan Motor Carrier and Motor Carrier Safety Acts. J.A. 12; 28.

C. Proceedings Below

Petitioners brought suit in the Michigan Court of Claims on behalf of all carriers subject to the Interstate Decal Fee and were certified as class representatives authorized to prosecute the action on behalf of similarly-situated class members.[11] Petitioners argued that the Interstate Decal Fee, to the extent it exceeds $10 per vehicle, is preempted by the SSRS. Pet. App. 38. In addition, because class members filed suit on January 3, 1995 and claimed refund rights under a three-year statute of limitations, Petitioners similarly maintained that Interstate Decal Fees exceeding $10 per vehicle were preempted by the federal "bingo card" program in effect before January 1, 1994. Pet. App. 68.

The Court of Claims ruled that the Interstate Decal Fee was not preempted. It decided that the SSRS did not

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[11] The lower court proceedings involved two consolidated cases that presented a combined challenge to both the Interstate Decal Fee and a separate $100 decal fee imposed by Michigan on intrastate-operated motor carrier vehicles. Pet. App. 37. The challenge to the intrastate fee was based upon a number of separate legal grounds, one of which is the subject of the grant of certiorari in No. 03-1230.

preempt the Interstate Decal Fee because the federal $10 per-vehicle fee cap applied to "participating states," but not the "registering state." Pet. App. 46. The Court of Claims also ruled against preemption under the predecessor "bingo card" program based on the same theory that the $10 fee cap imposed by the ICC did not apply to the "state of registration." Pet. App. 70.[12]

Petitioners appealed, and the Michigan Court of Appeals affirmed the Court of Claims ruling on separate grounds. Finding that the statutory language and accompanying federal regulations were clear, the Court of Appeals ruled that the "registration state is simply a participating state in which a motor carrier is registering." J.A. 82. Therefore, reasoned the Court of Appeals, "when the statute states that a participating state may not charge a fee in excess of $10, this includes the registration state." *Id.* The Court of Appeals thus rejected the rationale of the Court of Claims. Nevertheless, applying what it characterized as a "general presumption ... against federal preemption," J.A. 73, the Court of Appeals determined that the Interstate Decal Fee is not and has never been preempted because it may be characterized as a "regulatory fee."

Addressing the SSRS first, the Court of Appeals ruled that, if the purpose of a fee is to "regulate an industry or service," it may be classified as a regulatory fee. J.A. 83. From there, the court decided that the Interstate Decal Fee could be classified as a regulatory fee "because it is a

[12] It has never been clear whether the court's use of the terms "registration state" and "state of registration" was a reference to registration under the SSRS and "bingo card" programs or to vehicle "registration" involving the purchase of license plates.

fee imposed for the administration of the [Michigan Motor Carrier Act], particularly covering costs of enforcing safety regulations." J.A. 83. It then concluded that, "[b]ecause the fee ... is not a registration fee, it is not subject to preemption by 49 USC 11506." J.A. 83-84 (referring to 49 U.S.C. § 11506 (1994 ed.) before recodification at Section 14504). The court also ruled that the Interstate Decal Fee, as a "regulatory fee," was similarly "outside the scope of the federal law and was not preempted" under the "bingo card" program. J.A. 86. The Michigan Supreme Court denied further review after timely application by Petitioners. Pet. App. 75.

On January 14, 2005, following the filing of supportive comments by the United States, this Court granted Petitioners' petition for a writ of certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Yellow Transportation*, the Court confirmed that Congress's implementation of the SSRS "capped the per-vehicle registration fee that participating States could charge interstate motor carriers" to prove the lawfulness of their interstate operations. 537 U.S. at 40. The decision below, however, permits Michigan and other States to evade Congress's preemptive mandate by conveniently characterizing higher-than-authorized per-truck registration fees as "regulatory" in nature. That decision misinterprets the plain and unambiguous wording of Section 14504, reads a non-existent "regulatory fee" exception into the SSRS, and creates an indefinite and unmanageable loophole in the uniform system Congress designed for the

protection of interstate commerce. For those reasons, the decision below should be reversed.

A. The Michigan Court Of Appeals erroneously dismissed the plain meaning of Section 14504. The statute restricts State registration of interstate carriers to registration with a single base State, prohibits the collection of per-vehicle fees by any State other than the base State, bans vehicle-specific identification and registration, and preempts State assessment of any per-vehicle fee in excess of $10. Michigan's administration and assessment of the $100 per-vehicle Interstate Decal Fee, charged as it is for an interstate carrier's *registration* with the Michigan PSC, violates each of these requirements and most particularly the $10 fee cap of Section 14504(c)(2)(B)(iv)(III). The lower court's characterization of the Interstate Decal Fee as something other than a "registration" fee limited by Section 14504 poses a semantical distinction without a difference.

B. The Michigan court's attempt to read a "regulatory fee" exception into the SSRS is similarly misplaced. Even if the words of Section 14504 were less than clear, an examination of the statute's legislative history demonstrates Congress's intent to reduce interstate carrier costs through a uniform and more limited registration system. It is apparent, however, that Congress's preemptive rule would soon be subsumed by costly and diverse exceptions if States were permitted to circumvent the SSRS by merely labeling flat per-vehicle registration fees as "regulatory" in purpose. Michigan is free to use the federally-authorized $10 fee for any purpose it deems appropriate – and, indeed, uses its $10 and $100 fees for indistinguishable "regulatory" purposes – but the $100 fee's use does not justify its cost any more than its name. Congress's

finding that fees in excess of $10 are a burden on interstate commerce cannot be turned into implied authority for just such a burden merely because Section 14504 does not include the words "regulatory fee" in its directive.

C. Finally, the decision below creates a dangerous loophole in the uniform State registration program Congress designed. The lower court did not attempt to rest its case on any idea that the Interstate Decal Fee is somehow justified by the plating of an interstate truck in Michigan, but the simultaneous implementation of the SSRS and the mileage-based IRP defeats any such hypothesis. Congress's action evidences a dual purpose to both limit flat truck fees nationwide and require fair apportionment of all other vehicle fees imposed on interstate truckers. The Interstate Decal Fee and the Michigan Court of Appeals ruling upholding it, however, undermine Congress's goals. Accordingly, neither can withstand review.

ARGUMENT

A. The Michigan Court Of Appeals Erred In Failing To Enforce The Plain Meaning Of 49 U.S.C. § 14504

The first task in statutory interpretation – and often the only one – "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If the meaning of the statutory language is clear, the statute should be enforced straightforwardly according to its terms. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Put another way, when there is no ambiguity in the statute's

words, "'there is no room for construction'" and no real need for judicial translation applies. *United States v. Gonzales*, 520 U.S. 1, 8 (1997) (quoting *United States v. Wiltberger*, 18 U.S. 76, 96 (1820)). That rule is dispositive in this case because Congress's preemptive meaning is abundantly clear.

1. In Section 14504, Congress listed plain-spoken standards for State registration of interstate motor carriers, declaring that "[w]hen a State registration requirement imposes obligations in excess of the standards . . . the part in excess is an unreasonable burden [on interstate transportation]." 49 U.S.C. § 14504(b). One such standard is that an interstate motor carrier may be compelled to register with only one "base" State, and "such single State registration shall be deemed to satisfy the registration requirements of all other States." 49 U.S.C. §§ 14504(c)(1)(A); (C). Another standard is that only the "base" State may collect fees on behalf of itself and other participating States. 49 U.S.C. § 14504(c); (2)(A)(iii). Further, no State may require "decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by the carrier." 49 U.S.C. § 14504(c)(2)(B)(iii). And finally, the flat per-vehicle fee collected on behalf of any participating State is "not to exceed $10 per vehicle." 49 U.S.C. § 14504(c)(2)(B)(iv)(III).

Michigan's assessment of the Interstate Decal Fee on carriers engaged solely in interstate commerce fails to comply with each of these requirements. Even if an interstate carrier using Michigan-plated trucks registers under the SSRS with another State, it must still register its operations with and pay per-truck fees to the Michigan PSC, despite the mandate of Section 14504(c)(1)(C) that registration with a carrier's "base" SSRS State satisfies

"the registration requirements of *all* other States." (Emphasis supplied).[13] All Michigan-plated interstate carriers must also purchase a vehicle-identifying decal for each of their trucks even though Section 14504(c)(2)(B)(iii) bans such devices. Most importantly, the $100 fee Michigan-plated carriers pay is ten times the $10 permitted under the SSRS. The SSRS, however, draws no distinction between carriers using trucks plated in Michigan and carriers using trucks plated elsewhere. Rather, the SSRS requirements, including the $10 fee cap, apply without exception to *all* interstate motor carriers compelled to register their operations with *any* State regulatory commission under any State law. As a result, the $100 Interstate Decal Fee violates Section 14504 and is accordingly preempted.

2. The Michigan Court of Appeals imposed a strained construction upon Section 14504, ruling that Congress limited only the assessment of State "registration" fees, not those that may be labeled "regulatory" in nature. The court's narrow interpretation, however, is based upon an ill-conceived "presumption . . . against preemption" (J.A. 73). This Court has ruled that there exists no presumption against preemption when the matter at hand is "inherently federal in character" or when "the State regulates in an area where there has been a history of significant federal presence." *Buckman Co. v. Plaintiffs' Legal Committee*, 531

[13] Note that the "base state" requirements of the SSRS and the mileage-based IRP are different, such that a carrier may be SSRS-registered in one State while purchasing its license plates in another. Under 49 C.F.R. § 367.3, the "base" State for SSRS purposes is generally a carrier's *principal* place of business, whereas the "base" jurisdiction for IRP plating can be any State in which *a* place of business exists. International Registration Plan, Art. II, §§ 210, 218 (2003 rev.).

U.S. 341, 347-348 (2001); *United States v. Locke*, 529 U.S. 89, 108 (2000). This case presents just such a setting because the SSRS finds its roots in the Interstate Commerce Act, which is "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981).[14] Consequently, no presumption against preemption is at issue here, and the Michigan court's attempt to statutorily construct its way out of preemption conflicts with the cardinal rule that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). *See also Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 124 S.Ct. 1756, 1763 (2004) (declining to invoke the "presumption against preemption" to determine the *scope* of federal preemption).

In short, it is "well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive." *Missouri Pacific R.R. v. Stroud*, 267 U.S. 404, 408 (1925). And for almost forty years, Congressional action has evidenced a conspicuous exercise of that authority over State regulatory commission registration of interstate carriers and their motor vehicles moving in interstate commerce. Congress made plain its view early on that State registration requirements in excess of the ICC's

[14] "Since the turn of the [twentieth] century," this Court has "frequently invalidated attempts by the States to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the Interstate Commerce Commission or with Congressional policy as reflected in the [Interstate Commerce] Act." *Id.*

standards were "an unreasonable burden on [interstate transportation]," 49 U.S.C. § 11506(b) (1988 ed.), and the resulting ICC regulations imposing the $10 fee cap under the "bingo card" program were thereby afforded no less preemptive effect than the federal statute under which they were promulgated. *See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Congress then confirmed the preemptive scope of its action in 1991 with the adoption of the ICC's $10 per-vehicle fee cap, the directive that "single State registration shall be deemed to satisfy the registration requirements of *all* other States," and the statutory mandate that "[t]he charging or collection of *any* fee under this section that is not in accordance with th[is] fee system . . . shall be deemed to be a burden on interstate commerce." 49 U.S.C. §§ 14504(c)(1)(C); (c)(2)(C) (emphasis supplied). There can be no question, therefore, of Congress's meaning.

Surely the Michigan Court of Appeals' restrictive construction of Section 14504 is a classic example of elevating form over substance. The Interstate Decal Fee is just as much a "registration" fee preempted by the SSRS as is the $10 fee Michigan charges carriers that purchase their license plates elsewhere. Under Michigan law, *every* interstate carrier, regardless of the State in which it plates its vehicles, is prohibited from engaging in the interstate transportation of property in Michigan "without first having *registered* with the [PSC] and paid the required *registration* and vehicle fees." Mich. Comp. Laws § 478.7(1) (emphasis supplied). Michigan-plated carriers – just like carriers that purchase their license plates in other States – must file proof of federal operating authority, submit evidence of insurance, and name their agent for service of process purposes when they register with Michigan under

the SSRS. The singular difference between the two carriers is that a footnote on Michigan's SSRS form directs the Michigan-plated carrier to pay $100 instead of $10 per vehicle and to complete another form for the prohibited purpose of identifying its trucks by make, model, and serial number to obtain a decal for each. In substance, Michigan-plated carriers "register" with the PSC for the price of $100 per truck, whether Michigan calls the assessed fee a "registration" fee or not.

3. Other courts have recognized the preemptive impact of Congress's registration standards notwithstanding the names ascribed to the fees in question. The first two reported cases arose in Montana and addressed ICC regulations that, at the time, permitted a $5 maximum fee for the registration and identification of interstate vehicles under the "bingo card" program. In the first decision, *State ex rel. Sammons Trucking, Inc. v. Boedecker*, 158 Mont. 397, 492 P.2d 919 (1972) struck down a $10 "license fee," *id.* at 398, 492 P.2d at 919, ruling that "Congress has preempted the field of state regulation and identification of interstate motor vehicles using Montana highways." *Id.* at 400, 492 P.2d at 920. Similarly, *State ex rel. Sammons Trucking, Inc. v. Bollinger*, 169 Mont. 88, 544 P.2d 1235 (1976) nullified the State's attempt to impose the reduced $5 license fee on both the motorized unit and the trailer in a tractor-trailer combination. The court again expressed no hesitation in finding that the ICC regulations were controlling and that State statutes imposing greater or conflicting requirements "constitute an undue burden on interstate commerce and must yield to federal authority." *Id.* at 92, 544 P.2d at 1236. In neither case did the court express any concern over the "license" fee's name.

The Illinois case of *Roadway Express, Inc. v. Treasurer*, 120 Ill.App.3d 133, 458 N.E.2d 66 (1983) is slightly different, but equally persuasive. The issue addressed in *Roadway* was whether Illinois law complied with pre-1982 ICC regulations that permitted a $5 per-vehicle fee, but also authorized States to charge additional "regulatory fees" in order to defray the costs of trucking regulation. The "franchise fee" charged by Illinois (the name of which played no role in the court's decision) was not used for such a specific "regulatory" purpose, and so refunds of all fees paid in excess of $5 per vehicle were ordered. Importantly, the court also observed that no additional "regulatory fee" would be permissible after 1981 because the ICC amended its regulation in 1982 to "set an absolute limit of $10 on identification stamp fees" for all future operations. *Id.* at 135, 455 N.E.2d at 69.[15]

The Michigan Court of Appeals summarily dismissed this precedent based upon its attempted regulatory/registration fee distinction. J.A. 86-87 n.8. Again, however, the $100 Interstate Decal Fee is just as much a "registration fee" as the fees struck down in Montana and Illinois. Regardless of its nomenclature, the fee is collected in connection with a State regulatory commission's registration of interstate carriers and their interstate motor

[15] Although the Court has limited the question presented here to the SSRS portion of Petitioners' claim, the *Roadway* decision illustrates that the Interstate Decal Fee was no less preempted under the old "bingo card" program in effect for many years prior to the SSRS's implementation.

vehicles, which the Montana and Illinois courts rightly concluded is a subject plainly preempted by federal law.[16]

Even without the guidance of such precedent, however, the lower court could have resolved this case by application of two uncomplicated principles. First, statutory construction starts with the assumption that the ordinary meaning of Congress's words accurately express its purpose. *Engine Manufacturers Ass'n,* 124 S.Ct. at 1761 (2004). Second, when a federal statute unambiguously forbids State action on an industry affecting interstate commerce, courts need not look beyond the plain meaning of the statute to decide whether the challenged State action is preempted. *Aloha Airlines, Inc. v. Director of Taxation,* 464 U.S. 7, 12 (1983). Notwithstanding the lower court's characterization of the Interstate Decal Fee as something other than a "registration fee" preempted by Section 14504, just the opposite conclusion is self-evident.

[16] The Michigan Court of Appeals' reliance on *Franks & Son, Inc. v. State*, 136 Wash.2d 737, 966 P.2d 1232 (1998), *cert. denied*, 526 U.S. 1066 (1999) is just as misplaced as its attempt to distinguish the Montana and Illinois decisions. In addressing an issue not raised in the later petition for certiorari, the *Franks & Son* court made the same "form over substance" mistake in ruling that a Washington regulatory fee exceeding the $10 "bingo card" fee was not preempted. But in citing *Franks & Son* the court below overlooked the fact that the Washington legislature had repealed its additional regulatory fee upon implementation of the SSRS because "[t]he Congressional decision that each state could not register all carriers doing business in that state made it administratively difficult to impose any further regulatory fee. . . ." *Id.* at 745, 966 P.2d at 1236. Therefore, whatever its relevance to an evaluation of the "bingo card" program (and despite the Washington court's convenient reference to "administrative difficulty"), the *Franks & Son* ruling has no significance to the broad preemptive directive of Section 14504(c)(1)(C) that registration with a single base State under the SSRS "shall be deemed to satisfy the registration requirements of all other States."

Interstate carriers operating Michigan-plated trucks pay the Interstate Decal Fee because they are required to be "*registered* with" and pay "the required *registration* and vehicle fees" to the PSC for the privilege of operating interstate across Michigan's borders. Mich. Comp. Laws § 478.7(1) (emphasis supplied).[17] The $100 Interstate Decal Fee charged for that privilege is preempted, and the Michigan court erred in concluding otherwise.

B. The SSRS Has No "Regulatory Fee" Exception

Bypassing the express directive of the SSRS legislation, the Michigan Court of Appeals upheld the Interstate Decal Fee by finding it to be a so-called "regulatory fee" falling outside the preemptive scope of Section 14504. Even if the statute required some "interpretation" of Congress's meaning, the Court of Appeals' reasoning is flawed. No construction of the SSRS leaves room for a "regulatory fee" exception, because neither the label attached to the Interstate Decal Fee nor the use to which its revenue is put makes any legal difference to the preemption question presented.

1. In the first instance, the Michigan Court of Appeals disregarded Congress's conspicuous intent. Nothing in Congress's mandate authorizes State regulatory commissions to charge a per-vehicle fee in excess of $10, and nothing in the SSRS regulations or in the legislative history of the ISTEA suggests that anything more than

[17] Indeed, the PSC's Equipment List Form P-344-T calls for payment of "registration fees" and the "registration" of vehicles that must be identified by make, model, and serial number. *See* <http://www.michigan.gov/mpsc> (motor carrier; all forms) (viewed February 22, 2004).

$10 per vehicle is authorized. *See* 49 C.F.R. § 367.4. To the contrary, Congress expressed concern over industry estimates that the "bingo card" program was costing carriers "up to $250 million per year," and it thus sought "to benefit the interstate carriers by eliminating unnecessary compliance burdens" in the hope that consumers too would profit from resulting cost savings. H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1817. In other words, it was Congress's goal to establish "a fee system . . . that . . . minimizes the costs of complying with the registration system," which conflicts directly with any notion that States are free to increase carrier costs by tacking on additional fee expense over and above the $10 per-vehicle fee cap. 49 U.S.C. § 14504(c)(2)(B)(iv)(II).

The Court of Appeals also mistakenly decided that "regulatory fees" are not preempted because they are not expressly prohibited. J.A. 85 n.7. Even if Section 14504 were not clear, State law yields under the Supremacy Clause if it "stands as an obstacle" to full implementation of the federal law, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), or otherwise frustrates accomplishment of a federal objective. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000). In this regard, the Michigan court missed the obvious point that, if States could circumvent the SSRS by calling any flat, per-truck assessment a "regulatory fee," the uniform plan Congress designed would become so riddled with exceptions as to lose all force and effect. Preemption analysis, therefore, must rest upon something far more substantial than the label Michigan assigns to its fee. *See Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 127-28 (1993) (State may not avoid preemption by changing the name of its tax); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160,

164 n.3 (1980) (transaction privilege tax was preempted by Indian trader statutes "regardless of the label" placed upon it). *See also City of Detroit v. Murray Corp.*, 355 U.S. 489, 492 (1958) (in determining constitutionality of a tax, "we must look through form and behind labels to substance").

In any event, the Court of Appeals applies a backwards analysis in searching for the words "regulatory fee" in Section 14504. Congress took specific action in the statute to declare that flat vehicle fees in excess of $10 are a burden on interstate commerce. The backdrop of that action is this Court's dormant Commerce Clause jurisprudence, which acknowledges that flat unapportioned truck fees are unreasonably burdensome to interstate carriers. *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987). And while Congress certainly has the power to authorize State-imposed burdens on interstate trade, legislative intent to do so may not be merely inferred. *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 66 (2003). To the contrary, Congress must "manifest its unambiguous intent" and demonstrate a meaning that is "unmistakably clear" before a federal statute will be read to remove State regulation from the reach of the dormant Commerce Clause. *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992); *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). In short, Section 14504 cannot be read to impliedly authorize "regulatory fees" simply because Congress failed to use the phrase "regulatory fee" in its preemptive directive.

2. The commonsense conclusion is that the Michigan court's regulatory fee theory poses a distinction with only one real difference – a difference of $90. As we have shown, the $100 Interstate Decal Fee is just as much a

"registration fee" as the $10 fee authorized under the SSRS because Michigan Comp. Laws § 478.7(1) requires all interstate carriers to be "*registered*" with the PSC and the Interstate Decal Fee is assessed in exchange for an identification device – a decal that is affixed to a vehicle the interstate carrier must *register* with the PSC by make, model, and serial number. By the same token, the $10 SSRS fee is no less a "regulatory fee" than the $100 Interstate Decal Fee because both are unquestionably put to *some* "regulatory" purpose. Each is "placed to the credit of the [PSC]" under Mich. Comp. Laws § 478.6, and, after a designated portion of the $10 SSRS fee is deposited in the Michigan Truck Safety Fund pursuant to Mich. Comp. Laws § 478.7(5) (where it is put to "regulatory" use), both fees are then combined with all other PSC fee revenue and appropriated to the same "regulatory" agencies for the same "regulatory" purposes. J.A. 12; 28. The prohibited Interstate Decal Fee, therefore, serves no more regulatory purpose than the $10 fee States are permitted, but restricted to, under the SSRS.[18]

[18] In this regard, the Court of Appeals' citation to 49 C.F.R. § 1023.105 (1991) (J.A. 84) actually proves Petitioners' point. By urging States to use the $10 per-vehicle fee "for the purpose of defraying the cost of regulation," the regulation illustrates that $10 was to be the States' "regulatory fee" charge. In contrast, the Court of Appeals' citation to 49 C.F.R. § 1023.104 (1991) (J.A. 84) cannot support its decision. That regulation, which stated that the ICC's standards should not be construed "to affect the collection or method of collection of taxes or fees by a State from motor carriers for the operation of vehicles within the borders of such State," was not adopted with the 1993 amendments creating the SSRS regulations and is not current law. In addition, the regulation can only be "squared" with the ICC's longstanding $10 fee cap if it is interpreted as authorizing something *other than* per-vehicle identification fees specific to interstate motor carriers, such

(Continued on following page)

Accordingly, the "regulatory fee" theory is a too-convenient, unconvincing defense against the Interstate Decal Fee's preemption. When State regulatory commissions like the PSC require interstate carriers to register their operations, the $10 SSRS fee is the *only* per-vehicle "regulatory fee" authorized by Congress's preemptive act. The Michigan Court of Appeals decision to the contrary is plainly incorrect.

C. The Interstate Decal Fee Has No Place In The Uniform Federal Plan Congress Envisioned

The decision below fails to give appropriate deference to Congress's powers and creates a proverbial loophole through which States may escape time-honored federal authority and cause real harm to interstate motor carrier operations. That loophole cannot withstand reasoned scrutiny.

1. The Michigan "regulatory fee" approach, if adopted by other States, poses a significant threat to Congress's goal of reducing the regulatory burdens imposed upon interstate motor carriers. From the very beginning, Congress sought to afford interstate carriers "relief from [a] multiplicity of different State registration requirements" when it implemented the "bingo card" program in 1965. H.R. Rep. No. 89-253 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2923, 2929. In so doing, Congress hoped to make registration requirements imposed by State regulatory commissions uniform. *Id.* Then, in 1991, the SSRS was designed as a more "streamlined administrative

as the properly-apportioned income, fuel, property, and license plate taxes and fees that motor carriers otherwise pay.

process" so as to reduce inefficiencies, eliminate unnecessary compliance burdens, and lessen carriers' costs. H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1817. The decision below undermines each one of those goals by signaling every State to add to its $10 SSRS fee any "regulatory fee" amount it chooses, which would subject interstate carriers to a whole host of flat fees and vehicle registration requirements varying from State to State and would thus make compliance more burdensome, less efficient, and certainly more costly.

Moreover, because any fee can be put to *some* later regulatory use, the opinion below invites each of the 39 SSRS States to increase its $10 fee by any amount it can expediently call "regulatory" in purpose. Interstate truckers, no longer protected by the $10 fee cap, would then be at the mercy of State legislatures in need of revenue with every incentive to decide that $10 or even $100 per vehicle is not enough for their "regulatory" needs. And because the Michigan court's ruling does not in any way limit the "regulatory fee" justification to trucks plated within the State, other jurisdictions may more expansively apply their fees to all interstate vehicles operated by any SSRS-registering carrier. The decision below thus sends a message that, if $100 for Michigan-plated trucks is permissible in Michigan, then $500 or $1,000 for every truck crossing Ohio, Kansas, or any other SSRS State is perfectly acceptable too.

2. Lest there be some question, the Interstate Decal Fee cannot rest upon a hypothetical proposition (not even suggested by the Court of Appeals) that Michigan-plated vehicles somehow have a greater Michigan "presence" than vehicles plated elsewhere. In fact, the PSC's "rationale" for the fee – that Michigan-plated vehicles are "based"

in Michigan and make greater use of Michigan highways and services[19] – is neither premised on legislative finding nor grounded on any hard evidence. Interstate carriers plate their vehicles under the IRP, which authorizes "base-plating" in a single State that then collects, distributes, and apportions all other States' vehicle plating fees on a mileage basis. Michigan may be the base-plating State under the IRP merely because a motor carrier accrues mileage in Michigan and has a place of business there with a telephone line and an employee to make operational records available,[20] none of which demands a great "regulatory presence" or even requires that vehicles be actually "based" within the State's borders. Thus, large Michigan-headquartered carriers with significant Michigan operations can side-step the Interstate Decal Fee entirely by plating vehicles at one of their many out-of-state terminals, while small carriers with limited fleets and only a single terminal in Michigan must still pay $100 per truck whatever their level of "presence" on Michigan's highways and roads.

Regardless, any attempt to justify the Interstate Decal Fee on grounds related to a vehicle's use of the highways brings us full circle to the dormant Commerce Clause. As this Court explained in *Scheiner*, flat per-vehicle fees and taxes, by definition, "do not even purport to approximate fairly the cost or value of the use of [the] roads" and impose an undue burden on interstate commerce because their measure "'bears no relationship to the taxpayers' presence or activities in a State. . . .'" 483 U.S. at 290-91

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[19] J.A. 26.

[20] International Registration Plan, Art. II, §§ 210, 218 (2003 rev.).

(quoting *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 629 (1981)). It is an ironic twist, therefore, that Michigan applies the Interstate Decal Fee only to interstate vehicles IRP-plated in Michigan *and* attempts to justify the flat fee as somehow "presence"-based when the mileage-apportioned fees of the IRP were specifically contrasted with the flat per-vehicle taxes at issue in *Scheiner* and identified as Commerce Clause-compliant. *Id.* at 271-73; 282-83.

A second irony is that the IRP arises out of the same federal legislation that implemented the SSRS. Like the SSRS, the IRP was also adopted by the ISTEA in 1991[21] as part of a uniform, national plan to benefit interstate carriers. Just as it was concerned about creating uniformity and reducing costs in implementing the SSRS, Congress similarly standardized the IRP after heeding the House Public Works and Transportation Committee's advice that "[c]ompetition in the world marketplace dictates the elimination of unnecessary costs and the maximizing of efficiency." H.R. Rep. No. 102-171(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 1526, 1575. The key ingredient to the IRP, of course, is the apportionment of plating fees based upon the number of miles the carrier travels in each State, which not only passes constitutional muster, but also "reduces the motor carrier's overall operating costs."[22] It is not likely, therefore, that Congress could have intended to afford States free reign to increase the cost of either SSRS registration *or* IRP plating through

[21] H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1823.

[22] H.R. Rep. No. 102-171(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 1526, 1576.

the tacking on of a myriad of flat, unapportioned "regulatory fees" that frustrate the very purpose of Congress's action.

In sum, the lower court decision in this case should be overturned because it invites inconsistent, burdensome, and costly State regulation of interstate carriers and interferes with the uniform federal regulatory plan Congress has long envisioned. Enforcement of Congress's plan leads to the inescapable conclusion that Michigan's $100 Interstate Decal Fee upon vehicles operated solely in interstate commerce violates Section 14504 and is thus preempted under the Supremacy Clause of the U.S. Constitution. Any other result would render ineffective Congress's finding that flat per-vehicle registration fees imposed by State regulatory commissions burden interstate commerce and are forbidden by federal law unless limited to $10.

CONCLUSION

For the foregoing reasons, the decision of the Michigan Court of Appeals should be reversed.

Respectfully submitted,

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Nos. 03-1230 and 03-1234

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,
and USF HOLLAND, INC.,
Petitioners,
v
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.,
Respondents.

MID-CON FREIGHT SYSTEMS, INC ET AL.,
Petitioners,
v
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.,
Respondents.

On Writ of Certiorari
To The Michigan Court of Appeals

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QUESTIONS PRESENTED

1. Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.

2. Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 USC 14504.

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STATEMENT

A. The Michigan Motor Carrier Act.

The intrastate fee and the interstate fee at issue in these consolidated cases are part of a fee system contained in the Michigan Motor Carrier Act, Mich Comp Law (MCL) 475.1 *et seq*, that was originally enacted in 1933 to promote safety and conserve the use of Michigan highways. While the motor carrier transportation industry provides a public service, it also increases the risk of harm to the traveling public and damage to the public highways. J.A. 17. Because of that, the Motor Carrier Act requires motor carriers to pay their share of the costs associated with promoting safety upon and conserving the public highways through regulating motor carriers' use of the highways and assessing certain privilege fees and taxes. J.A. 17.[1] Under MCL 478.6, all fees collected under the Motor Carrier Act are placed to the credit of the Michigan Public Service Commission (MPSC) and the motor vehicle highway fund.

The motor carrier fees collected under the Motor Carrier Act go to the MPSC and the Motor Carrier Division of the Michigan State Police administration of that Act and for safety enforcement of the motor carrier industry. J.A. 21-22. Among the safety functions enforced are: vehicle requirements (e.g. brakes, oversize, overweight, load securement); driver requirements (e.g. hours of service, medical certificates); drug and alcohol testing requirements; safety inspections and audits; regulation of movement of hazardous waste. J.A. 12, 29-30. The Motor Carrier Division, through agreements, also enforces federal

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[1] According to the 1993-1994 National Association of Regulatory Utility Commissioners (NARUC) compilation of transportation regulatory policy, 45 States and U.S. Territories have some form of regulation of common carriers. The vast majority of these States and Territories also regulate insurance (45 States), safety (33 States) as well as the registration of interstate carriers (37 states). Thirty-nine States also assess a fee for intrastate registration of motor carrier operations. Thirty-two States or Territories utilize an identification device for vehicles such as a decal or stamp. A few States also regulate private carriers. J.A. 21.

requirements under Title XII of Pub L 99-570 and the Federal Motor Carrier Regulations, that are administered by the Federal Highway Administration of the U.S. Department of Transportation. J.A. 30. The enforcement of federal standards by the States with respect to motor carriers is not unusual. As Thomas Lonergan, Director of the Motor Carrier Regulation Division of the MPSC, noted in his affidavit regarding the enforcement of the Single State Registration System (SSRS), "[t]he ICC [Interstate Commerce Commission] has none of its own police officers or enforcement people to enforce ICC requisite requirements and relies on states for this purpose under the SSRS system." J.A. 20.

1. The Intrastate Fee.

Under MCL 478.2(1), motor carriers operating intrastate holding a certificate of authority issued by the MPSC are required to purchase a decal for each power unit for a fee of $100.[2] J.A. 23. This decal is affixed to the door of the vehicle and identifies that the carrier has paid the fee. J.A. 23. Each calendar year the decal must be replaced. J.A. 23. MCL 478.2(1) further authorizes a six-month decal for a fee of $50 after July 1. Also, under MCL 478.2(3) a motor carrier may purchase a temporary 72-hour permit for a fee of $10.[3] Therefore, such a motor carrier that is only involved in occasional or incidental intrastate commerce may obtain a $10 temporary permit. J.A. 63-64.

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[2] Before purchasing an intrastate decal, a for-hire motor carrier wishing to operate in Michigan, must first obtain a certificate of authority under MCL 478.1. J.A. 23. Neither this certificate requirement nor its corresponding fee are challenged in this case.

[3] In order to purchase a temporary 72-hour permit a motor carrier must have a certificate of authority under MCL 478.1 and have at least one truck with a MCL 478.2(1) intrastate decal. According to the MPSC's 2004 Annual Report a total of 4,928 temporary 72-hour permits were issued. See, <http://222.michigan.gov/documents/2004mpsc_annual_report_117786 _7.pdf>(accessed March 24, 2005)

The intrastate fee is the largest source of revenue for motor carrier regulatory functions performed by the MPSC and the Michigan State Police, Motor Carrier Division. J.A. 24. In the calendar year 1994, the MPSC collected approximately $2,905,000 in intrastate vehicle decal fees. J.A. 24.

2. The Interstate Fee.

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B. The Michigan Court of Appeals Decision.

The Michigan Court of Appeals below upheld both the MCL 478.2(1) intrastate fee and the MCL 478.2(2) interstate fee, as lawful regulatory fees. The Court held that the intrastate fee did not violate the Commerce Clause since it did not raise a significant barrier to participation in interstate trade. It found that the Petitioner American Trucking Associations' (ATA) claim that MCL 478.2(1) burdened interstate commerce was "a matter of pure speculation" and that the ATA "present[ed] no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could occur in the hypothetical." J.A. 101. The Court held that any effect the intrastate fee had on interstate commerce was incidental and did not rise to the level of discrimination. The Court of Appeals determined that the fee served a legitimate and non-discriminatory purpose and held that this was "an exercise of the State's police power and serves a critical function in protecting the people who use Michigan's highways." *Id.* It then concluded, "[o]n the basis of record before us, we cannot say that

the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways." J.A. 102.

The Michigan Court of Appeals also rejected the claim of the Petitioners Mid-Con Freight Systems, Inc., *et al* (collectively Mid-Con) and held that because the interstate fee was a regulatory fee and not a registration fee, it was not preempted by 49 USC 14504. J.A. 83-84. Petitioners ATA and Mid-Con both filed applications for leave to review to the Michigan Supreme Court, that were denied. 469 Mich 969; 673 NW2d 753 (2003).

SUMMARY OF ARGUMENT

In 03-1230, citing this Court's decision in *American Trucking Ass'ns, Inc v Scheiner,* 483 US 266 (1987), ATA argues that the intrastate fee violates the Commerce Clause because it is discriminatory and not fairly apportioned. In *Scheiner,* however, this Court held that a flat state tax or fee will not be held to be discriminatory when it is the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens. Such is the case here inasmuch as anything other than a flat fee would be both impracticable and pose an administrative burden.

The intrastate fee is fairly apportioned in that the fee does not constitute a tax on the interstate business' unitary income, but is rather assessed on a discrete event that can only occur in a single state. Moreover, in a line of cases beginning with *Osborne v Florida,* 164 US 650 (1897), this Court upheld the validity of a flat tax, that is not imposed upon the business of the company that is interstate, reasoning that no harm results to the company since it can freely conduct its interstate business without paying the slightest heed to an intrastate fee or tax.

ATA argues that this Court may look solely to the structure of the intrastate fee to see whether it's internally consistent, and with nothing more, make a determination that its practical consequences discriminates against interstate commerce. This

Court, however, has never struck down a law that did not facially discriminate as internally inconsistent by relying on a hypothetical taxpayer with a specific structure of factors and taxable income. As to determining the practical consequences, the Respondents believe the better view is that a fee or tax, that is not facially discriminatory, should only be held to be internally inconsistent if the structure of the tax can be shown by actual evidence to burden interstate commerce. As this Court noted in *Nippert v City of Richmond,* 327 US 416, 431 (1946) in judging the validity of a tax, it is "its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern." The Court then cautioned that "[t]o ignore the variations in effect which follow from application of the tax to highly different fact situations is only to ignore those practical consequences." *Id*

ATA's reading of this Court's decisions would achieve a radical and unsettling result whereby broad categories of flat, unapportioned state fees, such as annual business licenses or professional licenses would be at risk. Even more concerning is that all these laws would be placed in jeopardy based upon a calculus of hypothetical facts that dispenses with the need for actual, proven facts of discrimination.

ATA's argument that the Michigan Court of Appeals' decision constitutes a manifest evasion of this Court's precedents fails to pay heed to the important policy considerations at issue in this case. The Michigan Court of Appeals, two federal circuits and a State supreme court have all determined that the power of a State or municipality to regulate an activity to protect the safety and welfare of citizens and to charge a fee to help defray the regulatory costs incurred should be judged according to the balancing test employed by this Court in *Pike v Bruce Church, Inc*, 397 US 137, 142 (1970). Such a view represents a fair balancing of the interests involved in the competing concerns between the Commerce Clause and a State's police power.

In 03-1234, Mid-Con asks this Court to overturn the Michigan Court of Appeals' decision that the interstate fee is not preempted by federal law, specifically the Single State Registration System (SSRS), 49 USC 14504. Mid-Con argues that the plain language of Section 14504 expressly capped the per-truck fee at $10 that State regulatory commissions may levy against interstate motor carriers and that the Michigan Court of Appeals erroneously read into Section 14504 a non-existent regulatory exception.

As is clear from the text of Section 14504 itself and well as its legislative history, Section 14504 relates solely to the fees that a State may charge for filing proof of insurance and registration of its federal authority with the State. The Michigan interstate fee has nothing to do with the registering of the motor carrier's federal authority with the State. Michigan's interstate fee is assessed against Michigan-plated vehicles to help defray the safety and administrative costs of the MPSC and the Motor Carrier Division of the Michigan State Police. The Michigan Court of Appeals correctly interpreted Section 14504 and properly found that MCL 478.2(2) was not preempted.

ARGUMENT

I. The intrastate fee does not violate the Commerce Clause.

The Commerce Clause provides that "Congress shall have the Power . . . [t]o Regulate Commerce . . . among the several States." US Const, art I, § 8, cl 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc v Dep't of Environmental Quality of the State of Oregon*, 511 US 93, 98 (1994).

In *Western Live Stock v Bureau of Revenue*, 303 US 250, 254 (1938), this Court noted that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce

from their just share of state tax burden even though it increases the cost of doing the business." In *Complete Auto Transit, Inc v Brady*, 430 US 274, 279 (1977), the Court noted that its prior decisions established that it is not the formal language of the tax statute but rather its practical effect that is determinative. The Court then held that a state tax would survive a Commerce Clause challenge when the tax (1) is applied to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State. *Id.*

ATA's primary argument is that the intrastate fee is a tax that does not satisfy the second and third prongs of the test in *Complete Auto* and is contrary to this Court's decision in *American Trucking Ass'ns, Inc v Scheiner*, 483 US 266 (1987). While the Respondents do not agree that the intrastate fee is a tax (see Argument I.C. *infra*), it is clear that it is nonetheless valid when analyzed under these cases.

A. The intrastate fee does not discriminate against interstate commerce.

1. MCL 478.2(1) is not a protectionist measure but rather is a law that addresses legitimate local concerns with only incidental effects on interstate commerce.

This Court has held that, when analyzing any law under the negative Commerce Clause, the first step is to determine whether it regulates even-handedly with only "incidental" effects on interstate commerce or discriminates against interstate commerce. *Oregon Waste Systems*, 511 US at 99 (1994). Although this Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes, it has held that "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *Id.* Generally, a tax will fail Commerce Clause scrutiny if it discriminates on its face or if, on the basis of a "sensitive, case-by-case analysis of purposes and effects, the provision" will in

practical operation work discrimination against interstate commerce by providing a direct commercial advantage to local business. *West Lynn Creamery v Healy,* 512 US 186, 201 (1994); *Bacchus Imports, Ltd v Dias,* 468 US 263, 268 (1984). In short, the "crucial inquiry" is to determine whether the fee or tax is basically a protectionist measure or whether it can fairly be viewed as a law directed towards legitimate local concerns, with effects on interstate commerce that are only incidental. *Philadelphia v New Jersey,* 437 US 617, 624 (1978).

The intrastate fee under MCL 478.2(1) is imposed uniformly on both in-state and out-of-state vehicles. Therefore, it is not facially discriminatory. Nor does the fee constitute a protectionist measure since it does not erect a barrier to entry. Payment of the fee is not required of a motor carrier vehicle wishing to conduct interstate operations on Michigan highways. Lastly, the intrastate fee under MCL 478.2(1) is plainly directed toward legitimate local purposes, i.e., funding safety and related regulations, a point specifically noted by the Michigan Court of Appeals below. (MCL 478.2(1) "is an exercise of the state's police power and serves the critical function in protecting the people who use Michigan highways." J.A. 101.)

Citing this Court's decision in *Scheiner*, ATA argues that the intrastate fee is discriminatory. In *Scheiner*, the Court held that a flat marker fee and a flat axle tax assessed by Pennsylvania on each truck traveling through the state -- whether registered there or not -- violated the Commerce Clause. The Court found that the flat taxes imposed a substantially higher effective rate on trucks registered outside of Pennsylvania, with the lower effective tax rate inuring to the benefit of the local truckers. The Court noted that "[p]ermitting the individual States to enact laws that favor local enterprises at the expense of out-of-state business 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." *Id,* 483 US at 269, n 1. In this context, the Court added that "the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it

imposes on its own residents who also engage in commerce among the States." *Id,* 483 US at 282. The Court, however, specifically created an exception to its holding. And it is that exception that sustains the constitutional validity of the intrastate fee.

2. In *Scheiner*, this Court held that a flat tax does not violate the Commerce Clause when it is the only practicable means of collecting revenue from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens.

In *Scheiner*, the Court held that "the precedents upholding flat taxes can no longer support the broad proposition advanced by [Pennsylvania], that every flat tax for the privilege of using a State's highways must be upheld even if it has a discriminatory effect on commerce by reason of that commerce's interstate character." *Id* at 296. The Court, however, was careful to say that:

> Those precedents are still valid, however, in their recognition that the Commerce Clause does not require the States to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens. [*Id*]

This Court further defined the nature of this exception referring to two earlier decisions. The first was *Aero Mayflower Transit Co v Bd of Railroad Comm'rs*, 332 US 495 (1947) where the Court rejected a claim that a minimum fee of $15 in a fee structure based on gross receipts was unreasonable even though it would result in a tax fifteen times greater than if the standard percentage calculation had been used and stated:

> [The] Federal Constitution does not require the state to elaborate a system of motor vehicle taxation which will reflect with exact precision every gradation in use. In

> return for the $15 fee appellant can do business grossing $3,000 per vehicle annually for operating on Montana roads. Appellant was not wronged by its failure to make the full use of the highways permitted. [*Id* at 506, n 19.]

This Court in *Scheiner* then noted that "[o]ur disposition [in *Aero, supra*] was thus based on the costs the State would encounter in collecting taxes for vehicles that earned less than $3,000 annually in Montana." 483 US at 296, n 26.

The other case cited in *Scheiner* was *Capitol Greyhound Lines v Brice,* 339 US 542 (1950), in which the Court upheld a 2% fee on the fair market value of motor vehicles for the use of state highways because of the administrative burden of applying a tax formula that would vary "with every factor affecting appropriate compensation for road use." *Scheiner,* 483 US at 296, n 26, quoting 339 US at 546. Thus, a more finely tuned apportionment would be unworkable given the myriad of factors needed to effect a fair apportionment.

Thus, this Court's holding in *Scheiner* plainly does not require the invalidation of all flat taxes. Instead, when administrative realities prevent the use of more precise levies, unapportioned flat taxes are permitted under the Commerce Clause.

(a) The intrastate fee fits the *Scheiner* exception since no data system is available to fairly apportion the fee and to devise and implement one would pose genuine administrative burdens.

The intrastate fee fits the *Scheiner* exception since the use of a more finely gradated user-fee schedule poses genuine administrative burdens and the fee under MCL 478.2(1) is the only practicable means of collecting revenues. This was pointed out in the second supplemental affidavit of Thomas R. Lonergan, the MPSC's Director of the Motor Carrier Division, when he said:

> Plaintiffs suggest that the $100 per vehicle fee [478.2(1)] must be apportioned in some manner, such as mileage, but there is no data accumulation system available which could be used to separate miles traveled intrastate versus interstate. MCL 478.2(1) is based on transportation of intrastate shipments, and although the IRP [International Registration Plan] requires motor carriers to declare in advance the number of miles traveled by each vehicle in each state, there is no declaration of intrastate miles charged. Therefore, the IRP system could not be used for mileage data of intrastate operations.
>
> To devise a system based upon mileage would require accumulated data as to the number of intrastate shipments, the weight of such shipments, etc. to reach a reasonable apportionment of interstate versus intrastate revenue. This would make telephone service separations look simple. Both the motor carriers and the State of Michigan would need to devise complex systems for determining fee liability, billing, auditing and so forth. This approach appears to be administratively inefficient for the amount of fee revenue collected per year, approximately $3.5 million involving 3,000 motor carriers. [J.A. 64.]

As Mr. Lonergan states, there is no data accumulation system available that would permit the fair apportionment of the intrastate fee. Moreover, Mr. Lonergan says that to fairly apportion the intrastate fee, various other factors would need to be considered. Mr. Lonergan's statement thus establishes that apportionment of the intrastate fee would be impracticable, and would pose genuine administrative burdens in attempting to devise and collect the necessary data to allow for a fair apportionment.

(b) The use of a more finely gradated fee is impracticable in light of the amount of the fee involved.

Implicit in both *Aero Mayflower* and *Brice* is a finding that the fees assessed were nominal, particularly in relation to the value being conferred on the taxpayer. When compared to *Aero Mayflower* and *Brice*, the actual charge levied by MCL 478.2(1) is similarly nominal. For example, the $15 fee charged in *Aero Mayflower* in 1947 is equal to $123.63 in 2003 using the Consumer Price Index.[4]

The nominal "burden" imposed by the $100 fee in MCL 478.2(1) may be even further reduced, as the statute provides for two further reductions of the amount. First, MCL 478.2(1) provides that a motor carrier is to pay a fee of $50 per vehicle if the carrier begins intrastate operations after June 30. Second, MCL 478.2(3) further authorizes the MPSC to issue a temporary 72-hour permit to a certificated motor carrier at a fee of $10. As Respondents noted to the trial court below:

> [A] motor carrier that is only involved in occasional or incidental intrastate commerce would not have to pay $100 per vehicle pursuant to MCL 478.2(1). When an intrastate opportunity arises a motor carrier can obtain a $10.00 temporary permit. A motor carrier could operate for up to 30 days using the 10 cards before reaching the equivalent of the $100 decal fee. [See, Second Supplemental Affidavit of Thomas L. Lonergan, J.A. 63-64.]

[4] In 2003, $15.00 from 1947 is worth $123.63 using the CPI index; $102.17 using the GDP deflator; $221.86 using the unskilled wage; $334.73 using the GDP per capita; and, $674.69 using the relative share of GDP. See, Economic History Services, <http://www.eh.net.> (accessed March 24, 2005)

Thus, even if the intrastate fee under MCL 478.2(1) is considered to be a tax, it does not violate the Commerce Clause because it falls within the exception set forth in *Scheiner*.

B. The Intrastate Fee is fairly apportioned.

ATA claims that the intrastate does not satisfy the second prong of the *Complete Auto* test, i.e., that it is not fairly apportioned. Since 1983, this Court has used the principle of "internal consistency" when determining whether a state tax is fairly apportioned under the Commerce Clause.

In *Container Corp of America v Franchise Tax Bd*, 463 US 159, 169 (1983), this Court first suggested that a state tax, in order to be valid under the Commerce Clause, must have "what might be called internal consistency – that is, the [tax] must be such that, if applied by every jurisdiction, it would result in no more than all of the business' income being taxed." In *Armco, Inc v Hardy*, 467 US 638 (1984), the Court again applied the internal consistency test, striking down a West Virginia business and operation tax. The Court held that because the interstate manufacturer was subjected to a multiple tax burden that was not placed on an intrastate manufacturer the tax created an "impermissible interference with free trade." *Id* at 644. In 1987, again using the internal consistency test, the Court struck down a similar business and operations tax in *Tyler Pipe Industries v Washington Dep't of Revenue*, 483 US 232 (1987). On the same day the Court issued its decision in *Tyler Pipe*, it used the internal consistency test in *American Trucking Ass'ns, Inc v Scheiner, supra*, to strike down two Pennsylvania highway use taxes.

The Court's most recent description of the internal consistency test was in *Oklahoma Tax Comm v Jefferson Lines, Inc*, 514 US 175 (1995), which reviewed Oklahoma's state sales tax on bus tickets sold in Oklahoma for interstate travel. Jefferson Lines, a Minnesota corporation, provided bus services as a common carrier in Oklahoma without remitting the 4% sales tax for tickets it had sold in Oklahoma for bus travel from Oklahoma to other states, although it did collect and remit the

taxes for all tickets it had sold in Oklahoma for travel that originated and terminated within that state. Since Jefferson Lines did not challenge the tax on intrastate operations, this Court reviewed the interstate portion of the tax under the four-pronged test of *Complete Auto*. Applying the internal consistency test to Oklahoma's sales tax on bus tickets sold in Oklahoma for interstate travel originating there, this Court, 514 US at 185, said:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.

ATA argues that the internal consistency test, as applied in *Scheiner*, requires the invalidation of Michigan's intrastate fee. ATA contends that interstate carriers that transport one load between two points in Michigan, as part of their overall operations are unconstitutionally subject to the full $100 intrastate fee. They contend that in the course of an interstate haul, a truck that is passing through Michigan cannot 'top off' its load by transporting an additional load between two points in Michigan unless it has paid the $100 fee. According to the ATA, because the intrastate fee authorized by MCL 478.2(1) is a flat, non-apportioned fee it fails to satisfy the internal consistency test.

It should first be noted that the intrastate fee does not resemble the fees in *Scheiner*. While the flat marker fee and flat axle tax in *Scheiner* applied to all trucks traveling through Pennsylvania, Michigan's intrastate fee relates solely to those vehicles assigned by the carrier to haul intrastate loads within Michigan. Vehicles hauling only interstate loads do not pay a fee under MCL 478.2(1). Michigan's regulatory statutes and fees do not relate to or adversely affect the Federal Highway

Administration (FHA) interstate authority. Thus, unlike *Scheiner*, where a vehicle operating in interstate commerce could be subject to multiple axle taxes (if all States enacted them), regardless of how little travel was made in a State, a fee like Michigan's cannot result in multiple fees for interstate transportation. Thus, no multiple fees can result. If the carrier elects to conduct intrastate transportation in multiple States, then it may be subject to additional State fees. But, such a hypothetical was not addressed in *Scheiner*.

ATA then concludes that flat taxes, such as the intrastate fee, must necessarily fail the internal consistency test for two reasons. (ATA Brief, p 13.) First, it is argued that such a tax results in multiple taxation and second that interstate commerce is discriminated against because it imposes a higher effective per-mile rate on interstate trucks than on trucks that confine their operating to the taxing state. *Id.*

ATA's analysis, however, effectively eliminates the distinction between interstate commerce and intrastate commerce. The express wording of the Commerce Clause seeks to ensure that there is free trade "among the several States." Thus, the answer to the threshold question of whether the intrastate fee hinders the maintenance of a free trade area among the several States is that there is no basis, other than ATA's hypothetical and unproven claims, to prove that it does.

1. **If a multiple tax burden may be said to exist, it is not one that offends the Commerce Clause in that it is limited to discrete intrastate transactions.**

ATA argues that the intrastate fee is not internally consistent because if all 48 contiguous States were to impose a flat $100 fee on an interstate truck when conducting intrastate operations in each State it would result in a cumulative, or multiple tax burden of $4,800. Quoting this Court's decision in *Scheiner*, 483 US at 285, n 20, ATA (Brief, pp 14-15) claims that flat levies like the Michigan fee "bear much more heavily in the aggregate on a firm

that sells in many places than on a firm otherwise identical ... that sells in only one place." The foregoing quote from *Scheiner*, however, was made with respect to Pennsylvania fees that were different from the Michigan fee here. The Pennsylvania fees applied to all vehicles traveling its highways regardless of whether they were engaged in interstate or intrastate operations. In other words, the Pennsylvania fees plainly constituted an entry fee to engage in interstate commerce on Pennsylvania's highways. That is not the case here since a motor carrier's truck may use Michigan highways to conduct interstate operations without being subject to the fee under MCL 478.2(1). Thus, the fee imposed by MCL 478.2(1) applies only to trucks undertaking at least some point-to-point intrastate hauls in Michigan. This presents no danger of multiple taxation of those hauls since only the Michigan intrastate transportation, that cannot occur in any other State is being assessed. Moreover, the intrastate fee is internally consistent in that it does not constitute a tax of the business' unitary income. Where a "tax is assessed not on unitary income, but on discrete events, such as sale, manufacture and delivery, which can only occur in a single State or in different States that apportionment principle is not applicable; there is simply no unitary figure or event to apportion." *Tyler Pipe, supra,* 483 US at 256 (Scalia, J., dissenting.)

A line of this Court's cases support this contention since they subjected flat taxes on a transportation companies' intrastate routes to a more relaxed scrutiny than on their interstate routes. In *Osborne v Florida, supra,* 164 US at 654, the Court upheld a flat license tax that was applied to and affected only that portion of the business that was done in the state and was local in character. In upholding the tax, this Court stated:

> So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute.
>
> * * *

> The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the State whatever unless upon the payment of the fee or tax.
>
> * * *
>
> Here, however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State. [164 US at 655.]

This holding is in harmony with the distinction between the fees invalidated in *Scheiner* and the intrastate fee under MCL 478.2(1). The fees charged in *Scheiner* made no distinction between interstate and intrastate hauls and a motor carrier could not conduct any interstate business in Pennsylvania without first paying the fees. Like *Osborne,* but unlike *Scheiner,* the intrastate fee relates solely to intrastate activity.

The holding in *Osborne* was subsequently followed in a number of other cases decided by this Court. In *Pullman Co v Adams,* 189 US 420 (1903), the Court upheld a Mississippi partially - flat tax against a company that operated railroad sleeping cars that carried both interstate and intrastate passengers in the same cars. Mr. Justice Holmes, speaking for a unanimous court noted that, "the company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." *Id* at 422. Similarly, flat taxes were upheld in *Bode v Barrett,* 344 US 583, 585 (1953) and *City of Chicago v Willet Co,* 344 US 574, 580 (1953).

2. The practical consequences claimed by ATA are hypothetical and have not been proven.

ATA argues this *Osborne* line of cases has no place under this Court's current approach that looks to the practical consequences of the tax or fee. It is wrong, however, to assert that the logic in *Osborne* is no longer employed under the Court's modern decisions. For example, in *Commonwealth Edison v Montana,* 453 US 609, 617 (1980), this Court upheld a 30% severance tax Montana levied on each ton of coal mined in that State, rejecting the notion that there was multiple taxation, saying:

> Nor is there any question here regarding apportionment or potential multiple taxation, for as the State Court observed, "the severance can occur in no other state" and no other state can tax the severance.

Similarly, the intrastate shipment in this case can only occur in Michigan and Michigan alone can assess a fee for that shipment.

The *Osborne* cases should not be swept aside because they correctly note that there are valid distinctions between interstate and intrastate commerce, particularly with respect for the State's right to regulate legitimate local concerns pursuant to its police powers. Under ATA's approach, intrastate commerce ceases once an interstate business wishes to conduct a local, intrastate transaction. The existence of intrastate commerce then becomes dependent upon the identity of the regulated company and whether it is from out-of-State, rather than the nature of the activity that is occurring. The practical consequence of ATA's approach is that the state boundaries are no longer irrelevant. This is because of the identity of the person being regulated is being used to determine whether an activity (that is otherwise entirely local in character and does not cross state boundaries) affects interstate commerce. Such an approach is every bit as formulistic, as earlier approaches, such as *Spector Motor Service v O'Connor,* 340 US 602 (1951) that have been rejected by this Court.

Lastly, the practical consequences, as claimed by ATA, are speculative since the record does not establish either the existence or the extent of any competitive disadvantage or actual burden being placed on interstate commerce by MCL 478.2(1). ATA, however, citing earlier court decisions, argues that there is "no need for an empirical demonstration that a flat tax discourages interstate commerce." (ATA Brief, p 28.) The Respondents respectfully disagree.

3. A finding of internal inconsistency of a tax that is not facially discriminatory should be based on the application of concrete facts.

ATA argues that there is no need for an empirical demonstration that the flat tax discourages interstate commerce. (ATA Brief, p 28.) ATA's assertion in response to the brief by the United States supporting the grant of certiorari. (ATA Brief, p 29, n 13.) The United States suggested remanding the case for the Michigan Court of Appeals to develop a record on whether Michigan's fee scheme affects out-of-state carriers disproportionately.[5]

ATA cites *Bacchus Imports; Chemical Waste Mgmt, Inc v Hunt,* 504 US 334 (1992); *Oregon Waste Sys; Fulton Corp v Faulkner,* 516 US 325 (1996); *Camps Newfound/Owatonna v Town of Harrison,* 520 US 564 (1997), and *Jefferson Lines, supra,* for the proposition that no evidence or extent of discrimination must be demonstrated where a state tax discriminates. But the fees or taxes that were the subject of these cases were not like Michigan's intrastate fee. Unlike Michigan's fee, they did not provide a mechanism that ameliorates any potential discriminatory affect on interstate commerce. Under the Michigan fee structure a Michigan certificated motor carrier that wants to top off a load or conduct an intrastate haul can do so and

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[5] Respondents, as noted in their supplemental brief, oppose giving ATA an opportunity to develop a factual record on remand. ATA chose not to support their claims with facts when required to do so under the Michigan Court Rules. Summary disposition, was therefore properly entered against ATA.

pay only a $10 fee rather than the $100 decal fee. None of the fees or taxes that were the subject of the cases cited above had such a feature.

Michigan's fee is unlike the fees addressed in these cases because the Michigan fee targets intrastate activity. In the cases cited above, the invalidated taxes and fees were pointedly directed at interstate commerce. In *Bacchus,* certain alcoholic beverages produced in Hawaii enjoyed a tax preference over alcoholic beverages produced in other States. In *Chemical Waste* and *Oregon Waste* Alabama and Oregon subjected waste generated outside of their States to higher fees than waste generated within their States. In *Fulton* it was a credit for intangibles tax that was based on the amount of the corporation's income that was subject to North Carolina corporate income tax. North Carolina residents paid intangibles tax on the value of corporate stock that they owned. The more activity the corporation conducted in North Carolina the larger the tax credit. Again a clear burden on interstate commerce.

Only in *Scheiner* did Pennsylvania provide a temporary pass in lieu of the axle fee, one of the taxes at issue in *Scheiner.* But Pennsylvania did not provide any such relief from the $25 I.D. marker fee, which is more similar to Michigan intrastate fee. The Court did not discuss whether Pennsylvania's five day pass in lieu of the axle fee provided constitutional relief in *Scheiner.* Michigan's intrastate fee is different since it regulates intrastate activity. Moreover, by providing an alternative $10 fee, Michigan allows a carrier that only infrequently makes intrastate deliveries an alternative to the annual $100 fee. This is not equivalent to a fee based on mileage in Michigan as ATA seems to insist is necessary. But the $10 fee does limit a carrier's burden based on the frequency of intrastate deliveries.

There is no empirical demonstration that the alternative $10 fee does not provide relief to interstate carriers that may wish to occasionally top-off an interstate delivery with an intrastate delivery. Absent an empirical demonstration that $100 fee in

tandem with the $10 fee burdens interstate commerce, the intrastate fee should not be invalidated. ATA would have the Court invalidate the fee simply because it is $100 annual charge, not apportioned by mileage. ATA does not acknowledge that opportunity to pay the $10 fee in lieu of the annual fee provides a constitutional circuit breaker. This is a flat fee that is not based on highway usage. Nonetheless, it also provides an alternative for the occasional intrastate haul.

ATA asks the Court to invalidate Michigan's fee structure because it contains an annual $100 fee. This Court, however, looks to the entire statute when interpreting the effect of a particular provision. See e.g., *Bennett v Spear,* 520 US 154, 174 (1997). Thus, the Court should examine the entire structure of the fee, and not as ATA urges, strike down the statute without a demonstration that there is, in fact, discrimination.

ATA stakes out an untenable position. ATA would have every State fee fall if an interstate actor paid the fee. The United States correctly noted that the record did not establish that the fee did indeed burden interstate commerce. Before striking Michigan's intrastate fee, or any other State fee, this Court should ensure that the State has truly transgressed. Michigan requires an annual payment of $100 for the privilege of making intrastate deliveries. A motor fuel tax, for instance, would not be limited to intrastate transactions but would also fall on those operating solely in interstate commerce. There has been no showing that there is another practical method for assessing a fee on intrastate deliveries.

As to the practical consequences, the Respondents maintain that the better view is a tax is internally inconsistent only if the structure of the tax has been shown to burden interstate commerce through the introduction of concrete facts. Hypothetical "facts" should not form the basis for a determination that a regulatory fee that does not discriminate on its face lacks internal consistency. Indeed, as the Minnesota Supreme Court noted in *In re: Alternative Minimum Tax Refund Cases,* 546 NW2d 285, 290

(1996), this Court "has never found a violation of internal consistency by relying on the existence of a purely hypothetical taxpayer with a specific structure of factors and taxable income, to justify striking down a law that was not facially discriminatory."

ATA's citation to *Nippert*, 327 US at 431, is puzzling given that the transaction there was later characterized by this Court as being "essentially interstate" (*Dunbar-Stanley Studies, Inc v Alabama*, 393 US 537, 540 (1969). Moreover, in *Nippert*, 327 US at 431, this Court plainly indicated the critical importance of concrete facts when determining the practical consequences of a tax:

> It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. *Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. To ignore the variations in effect which follow from application of the tax, uniform on the face of the ordinance, to highly different fact situations is only to ignore those practical consequences.* In that *blindness* lies the vice of the tax and of appellees position. [footnote omitted; emphasis added.]

ATA, however, seeks to have this Court implement a review that incorporates a "blindness" to "concrete facts" when determining whether a state fee or tax is reviewed under the Commerce Clause.

Finally, ATA's approach would result in a disparity in the degree of evidence necessary to prove a burden on interstate commerce under the separate Commerce Clause tests employed by this Court. Under the *Pike v Bruce Church* test, used to analyze state regulations, no undue burden will be found where the burden is only incidental where the State regulates

evenhandedly. Under the *Complete Auto* test, used to analyze taxes and as interpreted by ATA, there is no corresponding level of "incidental burden" on interstate commerce that is allowed. Under ATA's zero-tolerance approach, only the State tax structure is analyzed and if a hypothetical construct can be advanced that yields the *potential* of multiple taxation, the tax is deemed to violate the Commerce Clause without regard to practical, or actual consequences, that are based on facts. It is no answer to say that the *Scheiner* exception is equivalent to an incidental burden because the burden in *Scheiner* is not related so much to the burden it places on interstate commerce as it is to the administrative burden it places on the State. The level of proof necessary to an "incidental burden" under either the *Pike* or *Complete Auto* test should be roughly similar. The approach advocated by ATA, however, results in an unwarranted and unwise disparity. Simply put, the problem with the approach argued by ATA is that it sacrifices a State's ability to regulate and to defray the costs of that regulation, over matters that pose legitimate local concern for vague and unproven benefits to interstate commerce.

4. ATA's argument, if accepted, would jeopardize any unapportioned flat state or local fee or tax.

The approach advocated by ATA could have a profound impact on existing state taxing structures, as *any* unapportioned flat state or local tax would necessarily fail under the internal consistency test.

As one commentator has noted "[t]he implications of this conclusion are rather unsettling," since several broad categories of state exactions would be in jeopardy, including: state fees and taxes on domestic and foreign corporations when first organizing or qualifying to do business in the state; annual business license taxes for carrying on trades and occupations; and professional and similar license fees. See Hellerstein, *Is 'Internal Consistency' Foolish?; Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH L REV 138, 154-155 (1988). Moreover, it is difficult to imagine how such fees could

ever be fairly apportioned. Would a fishing license to an out-of-state angler need to be apportioned based on the number or the size of fish caught? Or should State bar dues for an out-of-state attorney be apportioned according to the amount of revenue earned in the State? There is no need to embark upon the journey that ATA would have this Court take, since all such local, intrastate activities are properly subject to the State's police powers to regulate. Similarly, the State should be able to assess fees covering such intrastate activities to help defray the costs of regulation to protect the health, safety and welfare of its citizens.

C. The Michigan Court of Appeals correctly analyzed the intrastate fee under the Commerce Clause in accordance with this Court's decisions.

The Michigan Court of Appeals correctly concluded that *Scheiner* was not applicable to the intrastate fee since the test used in *Scheiner* and *Complete Auto* applies to taxes and not regulatory fees. ATA derides this decision as a "manifest evasion of this Court's precedents." (ATA Brief, p 22.) Moreover, ATA portrays the Michigan court's decision as if it were the only decision to hold that a regulatory fee, enacted pursuant to police powers to protect safety, health and welfare of the citizenry, should be distinguished from a tax. ATA fails to discuss similar holdings from the U.S. Courts of Appeals for the Sixth and Tenth Circuits and the Supreme Court of Washington. The distinction between a fee and a tax, as employed by the Michigan Court of Appeals in its Commerce Clause analysis, is constitutionally valid and is consistent with the decisions of this Court.

1. Other decisions distinguish regulatory fees from taxes under the Commerce Clause.

The U.S. Courts of Appeals for the Sixth and Tenth Circuits have distinguished a fee from a tax when determining its validity under the Commerce Clause. In *Interstate Towing Ass'n v City of Cincinnati,* 6 F3d 1154 (6th Cir, 1993), the Sixth Circuit upheld a Cincinnati ordinance that required the licensing of all tow trucks that tow vehicles from locations within the city limits to other city

locations, or to locations outside the city. The plaintiff association, citing this Court's decision in *Scheiner,* claimed the ordinance impermissibly burdened interstate commerce, arguing that it facially discriminated against Indiana and Kentucky towing companies, because they allegedly bore an unequal burden of the fees paid. The Sixth Circuit, citing *Maine v Taylor,* 477 US 131, 138 (1986), held that since the ordinance did not on its face "affirmatively discriminate" against interstate transactions, it did not automatically trigger heightened judicial scrutiny. 6 F3d at 1162.

The Sixth Circuit held that *Scheiner* was clearly distinguishable since the City's $80 fee could not properly be characterized as a user fee, as was the tax in *Scheiner.* 6 F3d at 1162. The Sixth Circuit found the City's fee to be different because it was assessed to help defray the costs of inspecting towing vehicles to ensure that all trucks providing towing services within City limits, Ohio-based and out-of-state-trucks alike, meet certain standards of safety. *Id.* In short, the Cincinnati fee was not charged for the privilege of using the City's streets, nor are City- or Ohio-based tow trucks exempt from the fee. Thus, State boundaries were "entirely irrelevant" to the fee. *Id.*

The Sixth Circuit rejected the contention that the fee resulted in a higher "per mile" cost to out-of-state towing companies, saying:

> While the burden of the fee is indeed less, as a percentage of revenue, for those firms that do more business in Cincinnati, this has nothing to do with the towing company's home *state.* And the fact that some of the firms on which the fee may fall more heavily, due to infrequent trips to the City, are based across state borders does not render the fee impermissible.
>
> The City deems safety, minimum levels of service, and consumer protection necessary for the provision of towing

services within its borders. Such concerns have consistently been regarded as legitimate, innately local in nature, and presumptively valid, even where regulations enacted to address those concerns have an impact on interstate commerce. [6 F3d at 1162-1163 (footnote omitted; citation omitted; emphasis in original).]

The Sixth Circuit also rejected the plaintiff association's claim that the Cincinnati Ordinance unduly burdened interstate commerce, because it failed the internal consistency test, saying:

Ours is not a case, however, in which the City has imposed a tax only "for the privilege of making commercial entrances into its territory," *id.* at 284, 107 S Ct at 2840, but one where the City is simply trying to regulate what it reasonably thinks is a potentially dangerous or troublesome activity carried on within its borders. As we have discussed, towing services are essentially local in nature, and give rise to legitimate local concerns about safety, consumer protection, and the like. And again, just because Cincinnati, or any other municipality, happens to be located on a state border does not alter this essential character of towing, transforming an otherwise local service into "interstate motor carriage" and rendering the otherwise neutrally applicable provisions of the Ordinance "impermissible burdens" on interstate commerce.

* * *

In the final analysis, this sort of regulation--local business regulation that applies to those within the city in precisely the same way as it does to those without--is properly overseen by the local political process, not the Commerce Clause. [6 F3d at 1165-1166 (footnotes omitted).]

Similarly, the Tenth Circuit in *V-1 Oil Co v Utah,* 131 F3d 1415 (10th Cir, 1997), upheld a Utah act that provided that a person could not sell, transport, dispense or store liquefied petroleum gas (LPG) without first obtaining a state license and

paying licensing and certification fees. The Tenth Circuit applied Utah law and determined that the charges were regulatory fees as opposed to taxes since they were used "to help defray the costs of inspecting LPG facilities and to ensure that all LPG handlers providing LPG services within the state of Utah meet minimum standards of safety." *Id* at 1423. The Tenth Circuit then upheld the license fees using the three-factor test set forth in *Pike. Id.*

The Supreme Court of Washington in *Franks and Sons v Washington,* 966 P2d 1232 (1998) upheld a gross weight regulatory fee that was used to fund a motor carrier safety program. Citing *Scheiner,* the plaintiff claimed that the fee was effectively a tax that was not internally consistent and violated the Commerce Clause. The Washington Court disagreed, saying that a regulatory fee is different from a tax:

This dichotomy is more than semantics because, where regulatory fees have been found not discriminatory, apportionment, and therefore the internal consistency test, has not been at issue in the majority of cases. [*Id* at 1238.]

That Court then noted that the differences between a tax, which is imposed under a state's taxing power, while a fee is imposed under a state's regulatory power.[6] Moreover, revenues from a fee are used exclusively for the purpose of financing regulation whereas revenues from a tax may be used for other purposes. The Washington Court then cited *Union Pac RR Co v*

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[6] This Court in *Commonwealth Edison v Montana, supra,* 453 US at 622, n 12, similarly noted that there is a difference between taxes and fees, saying:

As the Court has stated, "such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes." *Interstate Transit, Inc. v. Lindsey,* 283 U.S. 183, 190 (1931). Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, we have required a showing, based on factual evidence in the record, that "the fees charged to not appear to be manifestly disproportionate to the services rendered...."

Public Util Comm, 899 F2d 854 (9th Cir, 1990), in which the Ninth Circuit held a similar regulatory fee imposed by Oregon was not a tax and therefore fell outside the scope of the prohibition in the Railroad Revitalization and Regulatory Reform Act (4-R Act) on state taxes that discriminate against rail carriers. The Court in *Franks and Sons*, 966 P2d at 1238-1230, then quoted with approval the Ninth Circuit's statement that:

> The concerns underlying the constitutional limitations imposed on the taxing power by article I, section 8 are relevant to measures having the primary objective of raising revenues for the general support of government, but not to measures having the primary objective of regulating commerce. Thus, a levy to collect the costs of regulation from those regulated is not to be treated as a tax to which the limitations of article I, section 8 apply. *Union Pac RR Co,* 899 F2d at 859 (citations omitted).

Whether an exaction is a tax or a fee depends on whether its purpose is to raise revenue or to regulate an industry or services. See, e.g., *National Cable Television Ass'n v United States,* 415 US 336, 340-341 (1974). A tax is defined as a levy made for the purpose of raising revenue for a general governmental purpose; a fee is enacted principally as an integral part of the regulation of an activity and to cover the cost of regulation. *Franks and Sons,* 966 P2d at 1239.

The Washington Court declined to apply the *Complete Auto* test saying that there were policy reasons that the apportionment rationale should not be extended to nondiscriminatory regulatory fees. In particular, the Washington Court noted that if regulatory fees must be apportioned, then a whole host of local fees, designed to offset legitimate costs of regulation could be at risk. *Id* at 1240-1241. Based on its analysis, the Washington Supreme Court then utilized the three-factor test set forth in *Pike* and concluded the fee regulated evenhandedly with only incidental effects on interstate commerce, served a legitimate local purpose and could not be accomplished through alternative means.

2. The Michigan Court of Appeals' decision correctly balanced the State's police power with the Commerce Clause.

The Michigan Court of Appeals, like the Washington Supreme Court in *Franks and Sons,* examined the burden the fee imposes on interstate commerce and evaluated that burden according to this Court's decision in *Pike,* 397 US at 142 (1970) that stated:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co v. Detroit,* 362 U.S. 440, 443; 4 L. Ed. 2d 852, 856; 80 S. Ct. 813; 78 ALR 2d 1294. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with less impact on interstate activities.

This balancing test inherently recognizes that state regulation may have some effect upon interstate commerce, yet such regulation will not be invalid for that reason alone. Rather, the test balances the local and interstate interests involved.

MCL 478.2(1) constitutes a valid exercise of the state's police power. This was aptly noted by the trial court below:

> The interest furthered by that fee, viz., ensuring that vehicles and carriers operating on Michigan highways in intrastate commerce comply with MCL safety and fitness norms, is an exercise of state police power and the legitimate expression of the state's concern that the welfare of its citizens be protected. That interest plainly does not leave a prejudicial effect on interstate commerce

and thus does not impact the Commerce Clause. [03-1234, Petition, Appx. 49.]

This Court has declared that the Commerce Clause does not withhold from the States the power to regulate matters of local concern where Congress has not exercised its power, even though the regulation affects interstate commerce. In *Lewis v BT Investment Managers, Inc,* 447 US 27, 35-36 (1980), the Court stated that the Commerce Clause "limitation upon state power . . . is by no means absolute" and that "[i]n the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."

As the Michigan Court of Appeals noted, the Petitioners, "do not contest that the statute serves a legitimate non-discriminatory purpose, i.e., funding safety and related regulations." J.A. 101. Even though a statute enacted under the police powers of the state may affect interstate commerce, it does not translate into a burden on such commerce. For example, in *Huron-Portland Cement Co v Detroit,* 362 US 440 (1960), this Court held that a local air control ordinance was not unconstitutional as a burden on interstate commerce when it was applied to steam vessels operating in interstate commerce that were licensed and comprehensively regulated by the federal government. The Court found that the city code was an exercise of the police power, and that "[t]he mere possession of a federal license . . . does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce." 362 US at 447. The Court concluded that "[s]tate regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." (362 US at 448.)

The application of the *Complete Auto* test to the intrastate fee under MCL 478.2(1) ignores this valid exercise by the State to protect the welfare and safety of its citizens. Moreover, it does so

without any balancing of the interests involved. As such, it results in a disparity in the degree of scrutiny to be applied to a state statute that seeks to regulate to protect a state's citizenry. If a regulation that does not assess a fee is challenged under the Commerce Clause that state regulation may be subject to a balancing test whereby a factual analysis is undertaken to determine the level of the burden on interstate commerce. Should the same statute, however, impose a fee to defray the costs of regulation, it then becomes subject to an analysis of the "structure" of the fee where the person challenging the regulatory statute may prove, through hypothetical "facts" alone, that the burden on interstate commerce is undue.

Finally, the Respondents disagree with ATA's argument that *Scheiner* requires the apportionment of the intrastate fee. In *Scheiner*, the fees that were charged were used to fund general highway maintenance and repairs. Here the fees are used to underwrite the costs of various safety measures such motor carrier education, etc. This Court has not specifically determined whether an unapportioned fee used exclusively to fund regulatory safety activities should be reviewed under the same standard. Furthermore, while mileage may be an appropriate yardstick to use to reimburse a State for the use of its highways that does not necessarily hold true for reimbursing a State for its safety activities. Police departments routinely perform safety related functions yet those who benefit by those services are generally not taxed or assessed according to the frequency or magnitude of their use. Thus, the Michigan Court of Appeals correctly analyzed the intrastate fee as a regulatory fee subject to a Commerce Clause under the test in *Pike*.

II. The Michigan statute that charges a $100 annual fee for each motor carrier vehicle that has a Michigan license plate and is operating in interstate commerce is not preempted by 49 USC 14504.

Section 14504 was enacted by Congress as part of the Intermodal Surface Transportation Efficiency Act of 1991, to simplify the process of interstate motor carriers registering their

Interstate Commerce Commission (ICC) with the States. As this Court noted in *Yellow Transportation v Michigan,* 537 US 36, 40 (2002), "[u]nder the new system, called the Single State Registration System [SSRS] 'a motor carrier [would be] required to register annually with only one State', and 'such single State registration [would] be deemed to satisfy the registration requirements of all other States.'" The SSRS imposed a $10 cap on the per-vehicle registration fee that participating States could charge interstate motor carriers. Michigan is a participating State and charges registration fees authorized by the SSRS under MCL 478.7.

MCL 478.2(2) is part of a comprehensive regulatory scheme regulating motor carriers and charges a $100 annual fee for each motor carrier vehicle having a Michigan license plate and operating in interstate commerce. As noted in the Statement, revenues from the $100 fee are used by the State to defray the costs of regulatory safety enforcement.

Mid-Con's principal argument is that in Section 14504 Congress preempted the States from assessing interstate motor carriers any vehicle fees in excess of the $10 SSRS registration fee (Mid-Con Brief, p 23.) The United States supports Mid-Con and argues that MCL 478.2(2) is preempted by Section 14504 because it singles out interstate carriers for the charging of a fee based on the interstate character of their operations.

There is no preemption in this case. Neither the text of Section 14504 nor the Congressional purpose behind it support the expansive reading urged by Mid-Con. Moreover, it is clear from a review of the Michigan Motor Carrier Act as well as the MPSC's administration of that act that the charging of the fee to interstate carriers under MCL 478.2(2) is not based solely on their interstate operations.

A. Section 14504 does not preempt a state law enacted under the State's police powers unless that was the clear and manifest purpose of Congress.

This Court, in *New York Blue Cross v Travelers Ins,* 514 US 645, 654-655 (1995), summarized the scope of federal preemption analysis as follows:

> Our past cases have recognized that the Supremacy Clause, U.S. Const., Art. VI, may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law. . . . And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. . . . Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, . . . we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." [Citations omitted.]

Thus, "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm v Federal Communications Comm,* 476 US 355, 369 (1986). Furthermore, as this Court noted in *Cipollone v Ligget Group, Inc,* 505 US 504, 517 (1992), "[c]ongress' enactment of a provision defining the preemptive reach implies that matters beyond that reach are not pre-empted."

State regulatory power will not be deemed preempted by federal regulation unless Congress has "unmistakably so ordained." *Florida Lime and Avocado Growers v Paul,* 373 US 132, 142 (1963). An expressed intent to nullify a state regulatory program will not be lightly inferred. *Cf. Pacific Gas & Electric*

Co v California Energy Resources Conservation and Development Comm, 461 US 190 (1983). This is particularly so where, as here, the police power of the state is implicated. In *City of Columbus, et al v Ours Garage and Wrecker Service, Inc,* 536 US 424, 444 (2002), this Court observed:

> Preemption analysis "starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996) (internal quotation marks and citation omitted). Section 14501(c)(2)(A) seeks to save from preemption state power "in a field which the States have traditionally occupied." *Ibid.* (internal quotation marks and citation omitted).

City of Columbus involved federal preemption of any state action in the area of scheduling and rates for motor carriers of passengers, and the explicit exception to that preemption found at Section 14501(c)(2), preserving to the States the authority to regulate in matters of safety. The same preemption analysis employed in *City of Columbus* applies to the instant case. Congress has not, in Section 14504, expressed a clear and manifest intent to supplant the State's historic police power in the area of motor carrier safety with the limited registration requirements contained in Section 14504.

B. Section 14504 does not manifest an intent to preempt state laws having a separate and distinct purpose unrelated to the registration of an interstate carrier's ICC authority with the states.

1. The text of Section 14504, by its own terms, concerns the registration of a motor carrier's federal authority with the States.

With the SSRS, Congress eliminated the burdens associated with the multiple State registrations of an interstate carrier's

federal authority, and also established a fee system to minimize the cost of filing a proof of insurance. The specific requirements of the SSRS are set forth in Section 14504(c)(2) as follows:

> (A) **Evidence of certificate; proof of insurance; payment of fees.** – Under the amended standards implementing the single State registration system described in paragraph (1) of this subsection, only a State acting in its capacity as registration State under such single State system may require a motor carrier holding a certificate or permit issued under this subtitle –
>
> (i) to file and maintain evidence of such certificate or permit;
>
> (ii) to file satisfactory proof of required insurance or qualification as a self-insurer;
>
> (iii)to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and
>
> (iv)to file the name of a local agent for service of process.
>
> (B) **Receipts; fee system.** – such amended standards –
>
> * * *
>
> (iv)shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and . . . .

The scope of the standards authorized by Section 14504 relates only to those forms and procedures required by federal regulations to prove lawfulness of transportation by motor carrier. Section 14504 seeks only to provide the motor carrier with the benefit of registering their ICC authority in one state, for each of the states for which they intend to operate.

Thus, while Congress did, with the enactment of the SSRS, preempt a State from charging more than $10 for filing proof of insurance to operate within the borders of that State, it did not concurrently preempt the State from charging other fees to those interstate vehicles that are licensed in that State. Indeed, the United States recognizes that, notwithstanding the SSRS, States remain free to levy a variety of other fees and taxes (United States Brief, p 16). Thus, the SSRS was not intended, and did not, relieve a motor carrier from paying any and all State fees related to motor carrier vehicles.

2. The legislative history of 49 USC 14504 evidences a Congressional intent to only streamline standards related to the registration of a motor carrier's federal authority with the States.

Section 14504 was amended in 1965 in response to a need to control illegal interstate for-hire trucking. Pub L 89-170, 79 Stat 648 (September 6, 1965). The House noted that such illegal operators represented a "continuing concern" and that despite past legislative activity, "illegal for-hire trucking continues to be a significant problem today." H R Rep No. 253, 89th Cong, 1st Sess, *reprinted in* 1965 USCCAN 2923, 2924. Much of the remedy for this problem was addressed by adoption of additional civil enforcement provisions to be used by the ICC. In addition, there was an acknowledgment that States had attempted to help control the problem by requiring registration of ICC authorized carriers, but there was no uniformity in such State requirements. Hence, uniformity would be required. *Id.* It was specifically noted that the federal standards to be adopted under 49 USC 14504 were "to evidence the lawfulness of interstate operations of a carrier within a State. . . ." *Id* at 2928.

There is no basis for the proposition that state regulatory fees were to be considered "proof of legality of interstate operations." Indeed, it was specifically noted that:

> the purpose of such registration is to enable state enforcement officials to identify motor carriers hauling, on a for-hire basis, commodities subject to regulation and thus take on-the-spot action against those who have not the authority to do so. This, in effect, means that we want to encourage the states in helping the ICC keep unlawful interstate motor carriers off the highway. (111 Cong. Rec. 9672 (May 6, 1965) (statement of Rep. Harris, Chairman, Committee on Interstate and Foreign Commerce.)

Nothing here justifies the argument that Congress intended to deprive the States of their ability to otherwise regulate in the public interest, or to prevent the states from assessing regulatory fees. The Senate was consistent in its characterization of its version of the legislation, noting that the standards defined therein were to "evidence the lawfulness of interstate operations of a carrier," by registration of ICC certificates, proof of insurance and designation of agents for service of process. S Rep No. 387, 89th Cong, Sess, 4-5 (1965) at 4-5. Thus, the need for registration and identification requirements to be uniform was to assist the federal and State governments in addressing the problem of uncertificated, illegal interstate operators, not to eliminate fee-funded State regulatory programs.

C. The interstate fee under MCL 478.2(2) is unrelated to the registration of an interstate carrier's proof of insurance with the States.

MCL 478.2(2) is part of a comprehensive fee system, and provides for a $100 fee for each motor carrier vehicle that is operating entirely in interstate commerce and is license-plated in Michigan:

(2) A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce.

The regulatory fee provided for in MCL 478.2(2) is not required to prove an interstate carrier is properly certified under federal authority. It is not required to prove that a carrier's motor vehicles are legally registered. It is not required to prove that the carrier is insured, or that it has a named agent for service of process. The interstate fee provides funds that enable Michigan to enforce the Motor Carrier Act; the Motor Carrier Safety Act, MCL 480.11 *et seq*; the Michigan Vehicle Code, MCL 257.1 *et seq*; and the Fire Prevention Act, MCL 29.1 *et seq*. J.A. 24-25, 46-47. In short, it is a fee used to defray the costs of regulation and has nothing to do with proving that an interstate vehicle is properly certified or insured under Section 14504. Thus, MCL 478.2(2) is not within the preemptive scope of Section 14504.

D. MCL 478.2(2) neither conflicts with nor stands as an obstacle to the purposes of the SSRS.

There is no conflict between Section 14504 and MCL 478.2(2). The former provides for a single state registration to prove the lawfulness of transportation by a motor carrier and specifies registration requirements in terms of filing and maintaining ICC certificates, registering motor vehicles, filing proof of insurance and filing the names of registered agents. MCL 478.2(2) does not intrude upon such registration requirements, and does not impose any additional burdens upon motor carriers in terms of proving the lawfulness of its transportation. Rather, MCL 478.2 places a regulatory fee of $100 on each vehicle licensed in Michigan to pay for the administration of the Motor Carrier Act. There simply is no conflict between the state and federal law.

There has been no showing that motor carriers cannot effectively comply with both the federal and state law. While clearly hoping to avoid paying the regulatory fee assessed by

Michigan, there is no record support for the proposition that motor carriers cannot physically comply with both laws. The record would indeed imply just the opposite.

Lastly, MCL 478.2(2) does not obstruct the execution of the objectives underlying the enactment of Section 14504. Motor carriers continue to utilize the SSRS for purposes of registration, and payment of the $100 regulatory fee to Michigan has not proven to jeopardize the continued viability of the SSRS. The implementation of the SSRS and MCL 478.2(2) have not proven to be mutually exclusive, and Section 14504 should not, on such a tenuous and unproven basis be found to preempt the Michigan regulatory fee at issue here.

E. The preemption arguments advanced by Mid-Con and the United States lack merit.

Mid-Con argues that the plain meaning of Section 14504 does four things: (1) restricts State registration of interstate carriers to register with a single base State; (2) prohibits the collection of per-vehicle fees by any State other than the base State; (3) bans vehicle-specific identification and registration; and (4) preempts per vehicle fees in excess of $10 by any participating State (Mid-Con Brief, p 14.) However, the mere fact that such restrictions and limitation exist is not controlling on whether MCL 478.2(2) is preempted. What is controlling is whether, in accordance with Congress' preemptive purpose, those restrictions and limitations apply to the fee charged under MCL 478.2(2). So while the plain meaning of Section 14504 establishes these restrictions and limitation on registration fees under the SSRS, that does not mean they preempt the MCL 478.2(2) fee.

In arguing that Section 14504 preempts Michigan's interstate fee, Mid-Con and the United States take different paths. Mid-Con argues that the Michigan Court of Appeals erred when it determined that there was a presumption against preemption and that its construction is a "classic example of elevating form over substance." (Mid-Con Brief, p 17.) The United States argues that the text of Section 14504(b), the subsection in which Congress

defined its preemptive purpose, establishes preemption of the interstate fee, which it characterizes as "exorbitant."

The argument (Mid-Con Brief, pp 15-16) that Section 14504 pertains to a matter so inherently federal in character that the Michigan Court of Appeals below erred when it stated that there was a "presumption against federal preemption" lacks merit. In an attempt to extricate itself from that presumption, Petitioner Mid-Con cites to *Chicago & North Western Transportation Co v Kalo Brick & Tile Co*, 450 US 311 (1981), in support of the argument that the Interstate Commerce Act represents a comprehensive federal regulatory scheme which permits no presumption against preemption. This Court in *Chicago & North Western* did not, as Mid-Con suggests, simply dismiss the state law as preempted by this "comprehensive regulatory scheme," but rather framed the inquiry in this manner:

> In deciding whether respondent's state-law damages action is pre-empted, we must determine what Congress has said about a carrier's ability to abandon a line, what Iowa state law provides on the same subject, and whether the two are inconsistent. To these tasks we now turn. [450 US at 319.]

This approach is fully consistent with the preemption analysis advanced by Respondents here. Moreover, whether there is a presumption against preemption is not determinative of whether Section 14504 preempts the interstate fee. What controls is the language of the two statutes and, in particular, Congress's purpose in enacting the federal law. In this regard, the United States correctly looks to the text of Section 14504(b) to determine whether the fee charged under MCL 478.2(2) is the type of fee subject to the restrictions and limitations in Section 14504.

As to the argument that regulatory/registration concept is a distinction without a difference, Mid-Con erroneously claims that the MPSC "waives" the "federally compliant $10 fee." (Mid-Con Brief, p 7.) A reading of MCL 478.7(4) plainly discloses that the

MPSC only has the authority to charge the $10 fee to interstate motor carrier vehicles that are not plated in Michigan. The MPSC cannot waive the payment of $10 for Michigan plated vehicles when it has no power to require such a payment in the first place. There is no "registration" fee for Michigan plated vehicles under MCL 478.7. Nor does the SSRS registration form (J.A. 65-67) used by the MPSC transform the $100 fee in MCL 478.2(2) into a registration fee. In fact, the SSRS registration form clearly indicates that vehicles plated in Michigan are not to be listed on the SSRS registration form but are instead to use another form. (P-344-T.) The Michigan Legislature, in prior enactments, has regarded the fees charged under MCL 478.2(2) and 478.2(1) to be regulatory fees, whereas the fee charged under MCL 478.7(4) to be a registration fee. This conclusion is supported by an examination of legislative amendments to the Michigan statutes.

In 1988, the MCA was amended by 1988 PA 347, which raised the annual fee under MCL 478.2 from $50 to $100 and, in MCL 478.7, established for the first time an annual registration fee for interstate carriers licensed in another state for registering the carrier's ICC authority. Later that same year, the Michigan Legislature passed 1988 PA 369. This act added MCL 478.8, that states:

> The increase in the annual fee from $50.00 to $100.00 in section 2 of this article provided by Act No. 347 of the Public Acts of 1988 for a motor carrier licensed in this state and the new registration procedure instituted in section 7 of this article by Act No. 347 of the Public Acts of 1988 shall take effect January 1, 1990.

As the foregoing demonstrates, the Michigan Legislature expressly differentiated between the fee in MCL 478.2 and the "registration procedure" in MCL 478.7.

Contrary to Mid-Con's claim, the decision below does not create a dangerous loophole since the SSRS, the IRP and safety

regulation, along with the fees charged to defray the costs of that regulation, are three separate and distinct areas under the law. As previously noted, the SSRS seeks to reduce the burden of motor carriers registering their ICC operating permits with the States. The intended scope of that enactment is reflected in its language and does not extend to safety regulatory measures. The International Registration Plan (IRP) is defined at 49 USC 31701 as the "interstate agreement" on apportioning vehicle registration fees paid by motor carriers, developed by the American Association of Motor Vehicle Administrators. Similarly, the IRP relates only to registration requirements for the purposes of obtaining license plates. It does not include safety regulations. This is evidenced by Pub L 105-277, Div C, Title I, Oct. 21, 1998, 112 Stat 2681-586 that relates to the registration of trailers (container chassis) and the apportionment of fees for such registration in accordance with the IRP. Subsection (c) notes, however, that:

> (c) SAFETY REGULATION.--This section shall apply to registration requirements only and shall not affect the ability of the State to regulate for safety.

Thus, Congress viewed State safety regulations as being separate from the IRP. MCL 478.2(2) does not create a loophole when it regulates an area not covered by the SSRS or IRP.

Even though the payment of the fee under MCL 478.2(2) has no relationship whatsoever to the carrier's filing of its federal registration with Michigan, the United States argues that it is nonetheless preempted. It arrives at this conclusion by analyzing the two sentences contained in the "General Rule" in Section 14504(b) that states:

> (b) **General rule**.—The requirement of a State that a motor carrier, providing transportation subject to jurisdiction under the subchapter I of chapter 135 and providing transportation in that State, must register with the State is not an unreasonable burden on transportation

> referred to in section 13501 when the State registration is completed under standards of the Secretary under subsection (c). When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden.

The United States argues that when these two sentences are read together, State requirements that interstate carriers "must register with the State" are preempted as a general matter if they do not conform to the standards governing the SSRS, regardless of whether or not those state requirements are specifically worded in terms of a carrier's registration of its federal certificate with the State. (United States Brief, p 19.)

This, however, is not what Section 14504(b) says. The first sentence of that subsection says when the State registration is completed under the standards set forth in subsection (c) (i.e. maintaining evidence of certificate, filing satisfactory proof of insurance, etc.) there is no burden. The second sentence says that when a State imposes a registration requirement in excess of the standards in subsection (c), then those registration requirements constitute an unreasonable burden.

The argument by the United States that any State requirement, not just State registration requirements, are preempted proves too much. Within the context of the two sentences themselves, there are no words to indicate that State requirements, not linked to registering a motor carrier's federal certificate, are nonetheless preempted. Indeed, the United States admits as much when it says that there is "no indication that the current Section 14504(b), any more than its predecessor, was intended to preempt state laws and fees in traditional areas of state regulation, such as those governing registration and license plating of trucks under the IRP." (United States Brief, p 19.) But Section 14504(b) does not give the United States the power to pick and choose which State laws and fees in traditional areas of state regulation are deemed preempted and which are not. The regulation and enforcement of safety measures on motor carrier vehicles traveling on Michigan

highways is no less a traditional area of state regulation than the registering and plating of those vehicles.

The claim that Section 14504 preempts MCL 478.2(2) because it imposes distinct burdens on a class of interstate motor vehicles, based on the interstate character of their operations is mistaken. It is clear that the $100 fee is imposed on motor carrier vehicles that are "operating entirely in interstate commerce." It is this language alone, the United States argues, that singles these vehicles out for disparate treatment based on their interstate conduct. But it is also clear that there are other equally important factors that must be taken into consideration.

The fee in MCL 478.2(2) is not required of all interstate motor carrier vehicles. It is expressly limited to those that are Michigan-plated. The fact that MCL 478.2(2) only refers to those Michigan plated vehicles, however, does not mean that Michigan law "distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market." See, e.g., *Camps Newfound/Owatonna, Inc,* 520 US at 576. The Court should not ignore the practical effect of MCL 478.2(1) and MCL 478.2(2), and should recognize that when taken together, the two provisions impose a $100 fee on every for-hire vehicle license-plated in Michigan, regardless of the nature of its operations.[7] The United States suggests that the Respondents can neither properly argue nor can the Court properly reject the claim that MCL 478.2(2) is not preempted by the SSRS because it's part of a larger statutory regime that, when considered as a whole, does not discriminate against interstate commerce. (United States Brief, p 26.) The problem with this approach, however, is that this Court looks to the entire statute when interpreting the effect of a particular provision. *Bennett v Spear, supra,* 520 US at 174.

[7] It should be noted that in addition to Michigan-plated vehicles paying a $100 fee, either under MCL 478.2(1) or 478.2(2), other for-hire motor carrier vehicles, not plated in Michigan, that perform intrastate operations will pay the intrastate fee under MCL 478.2(1).

MCL 478.2(2) clearly should be read in conjunction with MCL 478.2(1) which requires a fee similar to that challenged here for motor carriers licensed in Michigan and operating intrastate.[8] When construed together, it is clear that the $100 fee required by the Michigan statutory regime operates as a regulatory fee on all for-hire motor carrier vehicles license-plated in Michigan. Therefore, the effect of MCL 478.2(2) is that a vehicle license-plated in Michigan is not excused from such a regulatory fee just because it is engaged in interstate commerce.

Finally, there is no merit to the United States' claim that the $100 fee in MCL 478.2(2) is exorbitant. Such a claim is only true when and is strictly dependent on whether it's the type of fee preempted by the SSRS. Thus, if it is not subject to preemption, it cannot be classified as an exorbitant fee. Indeed, the IRP, 49 USC 31707, expressly provides that there is no limit on the amount of money a state may charge for registration of a commercial motor vehicle or the amount of any fuel use tax a State may impose. Similarly, this court noted in *Scheiner, supra,* 483 US 271, 282, that registration and plating of a commercial truck can run into the thousands of dollars. Against this backdrop, the $100 amount of the fee in MCL 478.2(2) cannot be classified as exorbitant.[9]

[8] In *United States v Freeman,* 44 US 556; 3 How 556, 564-565; 11 L Ed 724 (1845), this Court observed:

> The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consieration [sic] in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law. [Footnote omitted.]

[9] While both Mid-Con and the United States are critical of the amount of the $100 fee in MCL 478.2(2), it should be noted that the decision where to plate and operate a vehicle is dependent on a wide range of economic variables. In this regard, Michigan has a number of economic factors that may significantly reduce the costs to motor carriers, including: increased weight limits (maximum 160,000 pounds allowance), no vehicle property tax, a staggered renewal process, and Michigan no-fault insurance requirements for public liability and property damage.

F. The State court precedents relied upon by Mid-Con do not support the conclusion that Section 14504 preempts MCL 478.2(2).

Mid-Con quotes *State Ex Rel Sammons Trucking, Inc v Boedecker,* 492 P2d 919 (1972) for the proposition that "Congress has pre-empted the field of state regulation and identification of interstate motor vehicles using Montana highways." (Mid-Con Brief, p 18.) This quotation, however, is not only inconsistent with the well-established principle that Congress has not preempted the field of state regulation of interstate motor vehicles, but directly contradicts another case cited in the same section by Mid-Con, i.e., *Roadway Express, Inc v State Treasurer,* 458 NE2d 66, 68 (1983), which held that Congress, in choosing to regulate transportation through the Interstate Commerce Act, did not intend to preempt the field of regulation.

Sammons involved a challenge to certain Montana identification, registration and licensing procedures for motor vehicles. It was argued that these Montana procedures imposed greater and conflicting requirements than the bingo regulations that limited state registration fees to $5.00 per vehicle [since increased to $10.00]. Yet, *Sammons* did not involve any discussion of a *regulatory* fee. The issue addressed there related solely to the state's *registration* fee, which Montana had failed to reduce from $10.00 to $5.00 as required by the new federal regulation. *Sammons* did not address the question of a State's authority to charge per vehicle *regulatory* fees.

Mid-Con also cites to *State Ex Rel Sammons Trucking, Inc v Bollinger,* 544 P2d 1235 (1976). That case reviewed the Montana Legislature's amendment that reduced the $10.00 registration fee to $5.00, so as to comply with federal law. The amendment also redefined "motor vehicle" and made any trailer, semi-trailer or dolly attached to a motor vehicle subject to the $5.00 registration fee. The Montana Supreme Court found this provision conflicted with the federal motor carrier regulations that limited the

definition of motor vehicle to vehicles having a mechanical drive unit. Thus, there was an actual conflict between the federal and State statutes.

Mid-Con's citation to *Roadway Express* similarly misses the mark. *Roadway* held that the Illinois commerce Commission possessed the power to adopt a fee that exceeded the federal limit and was not preempted by Congress from doing so. 458 NE2d at 68. But while the additional fees were legally imposed the Court held they were illegally disbursed because under Illinois law the money was used for purposes other than motor carrier regulation. *Id.* at 70. This is not the case in Michigan inasmuch as the revenues from fees closely match the expeditures for motor carrier regulation. J.A. 28. Thus, Michigan's regulatory fee, under MCL 478.2(2), is not, like its federally-approved $10.00 registration fee, applied to all interstate vehicles in Michigan. This regulatory fee is applied only when actual vehicular "presence" in Michigan is demonstrated, by commercially license plating the fee-paying vehicle in this state. Therefore, the Michigan Court of Appeals correctly recognized that Mid-Con confused the issue, noting that Michigan has complied with the SSRS through MCL 478.7(4) and that MCL 478.2(2) is unrelated to the purpose of the SSRS. J.A. 80, 83-84.

CONCLUSION

In 03-1230, even if the intrastate fee is analyzed as a tax, it is nonetheless constitutionally valid. This is because it falls within the exception set forth in *Scheiner,* that an unapportioned flat tax will not be found to violate the Commerce Clause when it is the only practicable means of collecting revenue from users and the use of a more finely gradated tax would pose genuine administrative burdens.

This Court should reject ATA's attempt to radically expand the scope of this Court's holding in *Scheiner* such that virtually any flat, unapportioned State assessment will constitute a violation of the Commerce Clause. ATA seeks to extend the internal consistency principle, which has been described as

requiring the invalidation of "any unapportioned flat tax on multistate activities" (*Id* at 303-304, Scalia J., dissenting), to include the invalidation of any fee on solely intrastate activities that *may* have an indirect, yet entirely unproven, effect on interstate commerce. Moreover, the questionable, hypothetical benefit to free trade occasioned by the striking down of the intrastate fee would come at the expense of the safety of Michigan's citizens.

ATA derides the distinction employed by the Michigan Court of Appeals between a regulatory fee and a tax under a Commerce Clause analysis, but fails to recognize the important policy considerations involved. Highway safety in the several States is not a one-size-fits-all proposition. The States should be afforded the flexibility to implement a fee-based highway safety program that is responsive to local conditions and concerns. Sacrificing the safety of the public on the States' highways under the banner of free trade unnecessarily frustrates the State's police powers to enact regulations to promote and protect the health, safety and welfare of its citizens. The approach taken by the Michigan Court of Appeals is the better approach in that it balances the legitimate concerns of the States to protect its citizens through the exercise of police powers with ensuring free trade among the States, while requiring actual, rather than hypothetical, facts to support any claim of discrimination.

In 03-1234, this Court should reject the claim that Section 14504 preempts the interstate fee. Neither the text of Section 14504 nor Congressional purpose in enacting the SSRS support the expansive reading that the Mid-Con and the United States attribute to it. The interstate fee is a regulatory fee that does not conflict with or stand as an obstacle to the Congressional objective of simplifying interstate registration requirements. This is made clear by an examination of the Michigan fee system as a whole which demonstrates that the interstate motor carrier vehicle is not singled out for disparate treatment. The Michigan Court of Appeals correctly found that Section 14504 did not preempt MCL 478.2(2).

Should this Court, however, issue an adverse decision against the Respondents in either 03-1230 or 03-1234, the Court should not require the payment of refunds to taxpayers, but should instead remand the case to the Michigan courts to determine how to apply this Court's holding, as it has in other cases where this Court has invalidated a state tax or fee. *See, Tyler Pipe,* 433 US at 251-253; *Bacchus Imports, Ltd,* 468 US at 276-277 (1984); *Williams v Vermont,* 472 US 14, 28 (1985).

The decision of the Michigan Court of Appeals should be affirmed.

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In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *ET AL.*,

Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

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MCL § 478.2(3) 18

Miscellaneous:

Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on Sate Taxation*, 87 MICH. L. REV. 138 (1988) 12

REPLY BRIEF FOR THE PETITIONERS

There is no denying the central reality of this case: the Michigan tax places significant burdens on interstate commerce. Its structure inevitably discourages interstate businesses from competing in the Michigan hauling market, while pressuring local businesses to confine their activities to the State. The tax therefore exacerbates the very tendencies toward economic Balkanization that it is the central goal of the Commerce Clause to prevent.

Given this reality, it is not surprising that Michigan and its *amici* are utterly unable to mount a coherent defense of the tax, to explain how the effects of the tax could be thought consistent with Commerce Clause principles, or even to articulate an intelligible test for distinguishing valid from invalid state levies. Indeed, it is revealing that, in significant respects, the dizzying stew of arguments advanced by Michigan and its *amici* are inconsistent with one another. Michigan and *amici* National Conference of State Legislatures, *et al.* ("NCSL"), for example, argue that the tax should be upheld as a regulatory fee; the United States disagrees. Meanwhile, *amici* States of Illinois, *et al.* ("Illinois") argue that even companies engaging in interstate transactions should be required to bear multiple state tax burdens; again, the United States takes a different view. As this disarray on respondent's side of the case suggests, there simply is no plausible basis on which the Michigan tax can be upheld.

A. The Michigan Tax Cannot Be Sustained On The Theory That It Falls On "Local" Activities

The centerpiece of the United States' oddly equivocal defense of the Michigan tax[1] is the assertion that, because the

[1] The United States recognizes throughout its brief that levies like the Michigan tax might well have impermissible effects on inter-

taxed activity has a "distinctly local character," the tax should be upheld on the ground that it "presents no heightened danger of * * * economic Balkanization." U.S. Br. 13, 14. Michigan and its other *amici* advance similar arguments. See Resp. Br. 14; Illinois Br. 21. For several reasons, this contention is manifestly wrong.

1. The United States focuses its argument exclusively on the proposition that the Michigan tax does not discourage the movement of goods interstate. But that assertion ignores the most obvious and pernicious effects of the tax: as we explain in our opening brief (at 16-17), the levy necessarily has a protectionist impact that discourages competition across state lines. Out-of-state truckers (or truckers conducting interstate operations) who make intrastate hauls in Michigan pay the tax at a higher effective rate than do truckers who confine their operations to Michigan, and their trucks will be forced to pay cumulative taxes if other states replicate the levy.[2] The

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state commerce. See U.S. Br. 13 ("the situs of the [taxed] activity is not by itself decisive"); 14 ("This is not to say that fees imposed for the right to perform intrastate motor carriage will never affect interstate commerce or implicate the concerns that underlie the Court's Commerce Clause jurisprudence."); 15 n.8 ("Affirmance of the state court's judgment would not preclude future constitutional challenge based on proof of actual and substantial impairment of interstate commerce, to similar (or substantially larger) fees on intrastate carriage[.]"); 19 (petitioners could "plausibly" argue that the Michigan tax has a significant "*practical* impact on an inherently mobile enterprise") (emphasis in original).

[2] As the United States acknowledges, the Commerce Clause precludes states from distinguishing "'between entities that serve a principally interstate clientele and those that primarily serve an intrastate market.'" U.S. Br. 8 n.4 (quoting *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 576 (1997)).

United States (and, for that matter, Michigan and its other *amici*) do not, and could not, deny that this is so.

As a consequence, the Michigan tax inevitably induces interstate operators to refrain from competing for local business in Michigan. By the same token, if an interstate trucker does pay the tax, the structure of the levy will place "hydraulic pressure" on that carrier to concentrate its activity in Michigan "rather than 'among the several States'" so as to lower its effective tax rate. *Scheiner*, 483 U.S. at 286-287. And for the same reason, the tax "discourage[s] [Michigan] corporations from plying their trades in interstate commerce." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 333 (1996). The tax thus protects local markets and places burdens on interstate business activities, directly implicating some of the principal goals of the Commerce Clause. See generally, *e.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 576-580 (1997).

So far as Commerce Clause policies are concerned, it is wholly immaterial that the Michigan tax discourages out-of-state (and interstate) operators from competing for *intrastate* business with local firms. This point is both obvious and fundamental. For example, the United States surely agrees that the Commerce Clause would preclude Michigan from imposing a *higher* tax on out-of-state (or interstate) operators for the privilege of making intrastate Michigan hauls than it imposes on truckers who confine their operations to Michigan – even though the taxed activity under such a regime would be just as "distinctively local [in] character" as is the taxed activity here. But as we have shown, and as the United States acknowledged in its filing at the certiorari stage,[3] the Michi-

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[3] See Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 16 (for carriers engaging in both interstate and intrastate carriage, "the cost-per-mile * * * for engaging in intrastate commerce within Michigan would generally be higher

gan tax has just such a discriminatory effect.[4] Indeed, because the structure of such a levy makes discrimination inevitable, there is no reason to differentiate the Michigan tax from one that is facially discriminatory.

2. For related reasons, the United States is incorrect in its argument that *Scheiner* is not controlling here. *First*, the United States observes that payment of the Pennsylvania fees challenged in *Scheiner* was "a *legal prerequisite* to the conduct within the State of *interstate commerce* using the covered motor vehicles," and that the Court's decision "focused on the potential impact of the challenged fees on *interstate* operations." U.S. Br. 22, 23 (emphasis in original). Therefore, the United States concludes, *Scheiner* has no implications for a case where "the fee is assessed for engaging in purely intrastate transactions or services." *Id.* at 23-24.

The United States accurately describes the tax in *Scheiner*, but its legal conclusion is a *non sequitur*. Perhaps because it rarely participates in cases involving the dormant Commerce Clause, the United States appears to be of the view that the Clause is directed only at state laws that burden

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than the cost-per-mile incurred by wholly intrastate carriers for engaging in the same commerce").

[4] The United States equates the Michigan tax to a sales tax, which need not be apportioned even when it falls on goods or services that travel interstate. U.S. Br. 15-16. But this analogy fails because, as the Court has explained, a sales tax is internally consistent. See *Jefferson Lines*, 514 U.S. at 187-188. Such a tax, which is measured by the value of the good or service sold, does *not* apply at a higher effective rate when more of a seller's sales occur outside of the taxing jurisdiction. See *id.* at 198-199. And unlike the Michigan tax, a sales tax does not impose the burden of cumulative flat taxes on businesses that sell in more than one state; the amount of tax paid will vary according to the volume of sales, not the number of states in which the taxpayer does business.

the delivery of goods *between* two or more states. See U.S. Br. 15, 23. But fundamental Commerce Clause policies are far broader than that: as we have just noted, the Clause also invalidates state laws that discourage out-of-state or interstate operators from competing with local businesses for intrastate business, that discourage local businesses from plying their trades in other states, or that pressure interstate operators into concentrating their activities in the taxing state (here, pressuring motor carriers into dedicating their trucks to intrastate Michigan hauls, rather than to interstate operations). See, *e.g.*, *Camps Newfound/Owatonna*, 520 U.S. at 576-580. *Scheiner*, which describes the "hydraulic" effects of flat taxes like Michigan's, makes clear that the levy challenged here has just those forbidden consequences.

Second, the United States recognizes the likelihood that, "*within the class of commercial motor vehicles that actually conduct point-to-point hauls within Michigan and are therefore assessed the $100 fee*, the average interstate vehicle will derive less benefit from the fee * * * than does the average truck that operates wholly in Michigan." U.S. Br. 25 (emphasis in original). But because vehicles that do not make point-to-point hauls in Michigan "will escape the fee entirely," the United States reasons that the tax "favors one subset of interstate vehicles (those that use Michigan roads exclusively in interstate commerce) while probably disfavoring another (those that engage in some point-to-point hauls in Michigan)." *Id.* at 26. The United States accordingly finds it unclear whether "interstate carriers *as a whole* pay a greater proportion [of receipts collected under the Michigan tax] than they would under [an] alternative mileage-based regime," or whether the tax "has an adverse *aggregate* impact on interstate vehicles." *Id.* at 25, 26 (emphasis added).

Again, however, this observation, even if accurate, is beside the point. It has never been the law that a state may insulate its local businesses against interstate competition in one

market by providing benefits to interstate firms that operate in a *completely separate* market; the United States does not cite any decision standing for that counterintuitive proposition.[5] A state plainly could not, for example, protect its local wine industry from interstate competition by waiving the tax due on sales of both domestically produced wines and foreign-produced beers, and by claiming that, *in the aggregate*, this system did not disfavor interstate liquor sales *as a class*.[6] Yet that is precisely the rationale advanced by the United States in support of the Michigan regime. The Michigan tax gives Michigan businesses an unfair advantage in competition for intrastate hauls, and that forbidden effect is not cured by unrelated benefits given truckers who are effectively precluded from competing in the local market.

Third, the United States accuses us of seeking a system "in which state boundaries have *no* economic relevance to a motor carrier's choice of routes," an outcome that the United States says could never be achieved because, for example, "some States charge higher per-mile fees than others." U.S. Br. 27-28 (emphasis in original). This contention confirms the United States' misunderstanding of the controlling principle. States are free to vary the *rates* of their *fairly apportioned taxes* (or to eliminate those taxes altogether) because such a system is internally consistent; companies that do the same volume of business in the taxing state are subject to the

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[5] The United States itself quotes the Court as framing the question in *Scheiner* to be whether the challenged taxes "'discriminate against *some* participants in interstate commerce.'" U.S. Br. 23 (quoting *Scheiner*, 483 U.S. at 282) (emphasis added).

[6] The dangers inherent in sustaining discriminatory state taxes on such a theory are obvious: states could provide a free pass to interstate businesses in fields in which in-state firms are not equipped to compete, while providing competitive advantages to local companies in fields in which in-staters are active.

same tax, applied at the same effective rate, no matter how many states those taxpayers traverse and how widely the tax rates in those states vary. But flat taxes like Michigan's have the opposite effect: they are structured to punish companies that do business in more than one state and *inevitably* tax interstate firms at a higher effective rate than the one applying to companies that confine their operations to the taxing jurisdiction. Such taxes do not "maintain state boundaries as a neutral factor in economic decisionmaking." *Scheiner*, 483 U.S. at 283.

3. Because it is wholly divorced from Commerce Clause policies, the United States' test turns on precisely the sort of artificial, metaphysical distinctions that the Court disavowed in *Complete Auto*. As we understand it, the United States' analysis goes as follows. (a) A flat tax that falls on a motor carrier that is (or may be) engaged in an interstate journey is per se invalid under *Scheiner*. See U.S. Br. 23 n.12. (b) A flat tax that falls on a "distinctly local" activity or event is subject to a looser test; such a levy will be invalidated only in the face of "record evidence concerning [its] actual impact on interstate carriage" or when there is "an established likelihood of systemic burdens on interstate commerce." *Id.* at 13, 27. (c) The tax here is "distinctly local" because it falls on an event that has "its locus wholly within Michigan" (*id.* at 16), the tax therefore is subject to the more permissive test, and (in the United States' view) there has been an insufficient showing that the tax places "systemic burdens on interstate commerce." *Id.* at 27.

On the face of it, the United States' rule would resurrect the very approach that prevailed prior to *Complete Auto*, when the validity of state taxes also turned on whether the incident of the tax was said to fall on some "distinctly local" activity. See Pet. Br. 32-33. The United States' test would involve precisely the same semantic hair-splitting, manipulation, and artificial formalism that bedeviled the Court's

Commerce Clause doctrine during that period. Here, for example, it is not at all clear why the Michigan tax should be characterized as wholly local in its effects; after all, when an interstate operator is making the intrastate haul, the equipment used to provide the service in Michigan *has traveled across state lines to do so*. And more broadly, as Justice Rutledge explained for the Court in *Nippert*, a test like the one proposed by the United States invites states to engage in semantic gerrymandering of their laws so that their taxes purport to fall on some separable local incident. Although the United States acknowledges this danger, agreeing with us that "'virtually all interstate activities can be broken down into component parts that take place entirely within one state'" (U.S. Br. 13 (citation omitted)), it offers absolutely no method for determining when taxes on these local activities are subject to the test of *Scheiner* rather than the one that is said to govern levies on "local activities."[7] Tellingly, although we raised this concern in our opening brief, the United States offers no response.

The artificiality of the United States' test, and its close kinship to the rule that prevailed prior to *Complete Auto*, is nicely illustrated by the Solicitor General's invocation of the "peddler" cases. Quoting at length from *Wagner* v. *City of Covington*, 251 U.S. 95 (1919), the United States propounds

[7] To offer just one example of the myriad sort of questions that might arise, imagine a flat state tax on trucks that make "deliveries of waste for disposal at a landfill in the taxing state." Under the Solicitor General's test, is such a tax subject to the rule of *Scheiner* because the waste might have been transported across state lines into the taxing state for delivery to the landfill? Or is it subject to the more forgiving standard the Solicitor General would apply to taxes on "distinctly local activities" because delivery to an in-state landfill "is a distinct and independently significant commercial transaction having its locus wholly within [the taxing state]"? U.S. Br. 16. The United States offers no way to answer this question.

a rule under which a transaction is treated as "local" (and therefore subject to a flat tax) when a peddler carries a product manufactured in State A across state lines into taxing State B, where he or she sells it – but a transaction is treated as "interstate" (and therefore *not* subject to a flat tax) when that same peddler (now called a "drummer") enters that same taxing State B and agrees to sell that same product, but has the product shipped to the purchaser from State A. See *id.* at 101-103; U.S. Br. 20-22. Thus, under the United States' rule, the constitutionality of a tax turns on whether the product is carried into the taxing state by the salesman or mailed into that state from the salesman's place of employment. It hardly seems necessary to observe that this distinction is completely divorced from economic reality, will lead to gamesmanship and manipulation of the worst kind by both states and taxpayers, and has no connection to Commerce Clause policies.[8]

B. This Court's Precedents Cannot Sustain The Michigan Tax

This Court's older decisions cannot be used to salvage the Michigan tax. Arguing to the contrary, the United States invokes *Osborne* v. *Florida*, 164 U.S. 650 (1897), and several similar holdings. As we explained in our opening brief

[8] The United States suggests that congressional action in this area "confirms the distinctly local character of point-to-point hauls within a single State." U.S. Br. 16. This is a surprising assertion. In fact, Congress has *preempted* state laws "related to a price, route, or service of any motor carrier" (49 U.S.C. § 14501(c)(1)) – even, as the United States acknowledges, "insofar as such regulation pertains to point-to-point hauls *within a single State*." U.S. Br. 17 (emphasis added). While there are some exceptions to this blanket preemption (see *id.* at 17-18), Congress's decision to generally preempt intrastate trucking regulation by the states demonstrates that burdens imposed on intrastate carriage may well impede interstate commerce.

(at 32-37), however, those decisions were premised on the discredited, pre-*Complete Auto* view that taxes on local activities are wholly immune from Commerce Clause challenge. The United States makes no response to this point, and no attempt to defend the analysis of *Osborne*.[9]

Instead, the United States points to dicta from a decision that it failed to cite in its brief at the certiorari stage, *Sprout* v. *City of South Bend*, 277 U.S. 163 (1928), in an effort to establish that the rule of *Osborne* is not "the relic of a bygone constitutional era." U.S. Br. 13. But *Sprout* cannot carry that much freight. In observing that states may impose flat occupation taxes on entities engaged in intrastate commerce, *Sprout* simply cited *Osborne* and similar decisions; its observation therefore appears to have been premised on *Osborne*'s view that taxes on intrastate activities are immune from Commerce Clause scrutiny. See 277 U.S. at 170-171. That view plainly has not survived, however. See Pet. Br. 32-33. Indeed, it is not shared even by the United States, which agrees with us that such taxes may have impermissible effects on interstate commerce. See note 1, *supra*. Dicta in *Sprout* – which, after all, *struck down* a tax that was *not* imposed on intrastate activities – therefore cannot sustain the Michigan tax.[10]

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[9] The United States is wrong in asserting (at Br. 11) that we do not take issue with the validity of the Michigan tax under the rule of *Osborne*. In fact, we explained in our opening brief (at 35) that *Osborne* did not address the question whether a tax on intrastate activities must be apportioned to preclude discrimination against interstate commerce.

[10] The United States reasons that *Sprout*'s citation to *Osborne* shows that the latter case espouses a modern view of the Commerce Clause because the Court in *Sprout* recognized that interstate commerce is not wholly immune from state taxation. U.S. Br. 12. We agree, of course, that "the Court's understanding of the

As noted above, the United States also cites the peddler cases in support of the Michigan tax. U.S. Br. 20-22. See also Resp. Br. 22; Illinois Br. 24. But those decisions, too, have been overtaken by the Court's modern doctrine. In *Wagner*, upon which the United States primarily relies, the Court applied the pre-*Complete Auto* metaphysics, reasoning that entities engaged in interstate commerce are "not subject to the licensing power of the Kentucky municipality" (251 U.S. at 101), but that taxes imposed on local activities are immune from Commerce Clause review because they are "not to be deemed a regulation of or direct burden upon interstate commerce." *Id.* at 102. The other peddler cases cited by the United States used the same wooden analysis. See *Dunbar-Stanley Studios, Inc.* v. *Alabama*, 393 U.S. 537, 540 (1969) ("the issue is whether the local activity which is made the nominal subject of the tax is 'such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it'"); *Eli Lilly & Co.* v. *Sav-On-Drugs, Inc.*, 366 U.S. 276, 279 (1961); *Caskey Baking Co.* v. *Virginia*, 313 U.S. 117, 119 (1941) (tax on "purely local business" "imposes no burden upon interstate commerce"). These decisions, which "focus[ed] on * * * formalism [that] merely obscure[d] the question whether the tax produce[d] a

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dormant Commerce Clause has taken some turns" over the years (*Jefferson Lines*, 514 U.S. at 180), and that *Sprout* turned in the right direction when it reasoned that states may impose fairly apportioned taxes on interstate commerce. See generally *id.* at 180-183 (reviewing ups and downs of Commerce Clause doctrine). But *Sprout* plainly relied on the "old formalism" (*id.* at 181) when its dicta approved of flat intrastate fees – a point proven by the metaphysical decisions on which that observation relied. See 277 U.S. at 171 (citing, in addition to *Osborne*, *Postal Tel. Cable Co.* v. *City Council of Charleston*, 153 U.S. 692 (1894); *Kehrer* v. *Stewart*, 197 U.S. 60 (1905); *Watters* v. *Michigan*, 248 U.S. 65 (1918); and *J.E. Raley & Bros.* v. *Richardson*, 264 U.S. 157 (1924)).

forbidden effect" (*Complete Auto Transit*, 430 U.S. at 288), do not provide persuasive guidance here.[11]

C. Concern About The Validity Of Other Flat Taxes Is Not A Basis For Upholding The Michigan Tax

Although Michigan and its *amici* are unable to offer a coherent defense of the Michigan tax, they do argue vigorously that the tax should be upheld because striking it down would lead to the invalidation of many *other* flat state taxes. See U.S. Br. 18-20; Resp. Br. 23-24. On the face of it, this is a peculiar argument; if a tax has impermissible effects, it *should not* stand.[12] Thus, the United States, although recognizing that some fees it identifies confer privileges that are more valuable to local than to interstate businesses (U.S. Br. 18), does not take the time to explain why those fees nevertheless should be thought consistent with the Commerce Clause. But in any event, as often is the case, some rain must

[11] Moreover, notwithstanding the United States' argument to the contrary (at Br. 22), this case is more like the "drummer" than the "peddler" cases. That certainly is true of situations where a Michigan customer contacts an out-of-state dispatcher to send an interstate truck to make an intrastate Michigan haul; in such circumstances, as in *Nippert*, something of value has been sent across state lines at the request of a customer in the taxing state.

[12] Indeed, many of the taxes defended by Illinois (at Br. 14-15) are levies on motor carriers that are identical in their effects to those of the Pennsylvania taxes invalidated in *Scheiner*. And while Illinois (at Br. 14) and Michigan (at Br. 23) note Professor Hellerstein's suggestion that the implications of *Scheiner* could be "rather unsettling" (Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 153-154 (1988)), they fail to acknowledge his conclusion that taxes like the ones they cite work "a paradigmatic 'impermissible interference with free trade.'" *Ibid.*

fall on the parade of horribles: this argument regarding other taxes is, in reality, grossly overstated.

First, many of the taxes cited by Michigan and its *amici* plainly would survive Commerce Clause scrutiny. Some will qualify as per-use fees, which approximate the cost of specific services provided to the taxpayer by the state, or the cost of the use of state facilities by the taxpayer. See *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 621-622 & n.12 (1981); *Scheiner*, 483 U.S. at 289-290. Others may be permissible because they approximate the administrative cost to the state of, for example, issuing a license or conducting background investigations precedent to the grant of a permit. Cf. *id.* at 274.[13] Still others will be supportable because apportionment would be wholly impractical or would impose insuperable administrative burdens. See *id.* at 296.

Second, even as to those flat fees that are constitutionally problematic, states generally will be able to satisfy Commerce Clause requirements with a minimum of disruption. Nothing would prevent a state from imposing a flat fee on taxpayers who confine their activities to the taxing jurisdic-

[13] Requiring interstate businesses to obtain licenses or undergo background checks in multiple states could itself impose cumulative burdens on such firms. But whether or not fees pegged to the administrative costs of issuing such licenses are subject to Commerce Clause challenge, such fees are decisively different from the Michigan tax. Scrutinizing businesses that operate in-state is an aspect of the states' unchallenged right to exercise their police powers in furtherance of public safety. When a state requires a business to pay the costs of such screening, it can be said simply to be requiring interstate commerce to pay its own way. See *Complete Auto Transit*, 430 U.S. at 288. That sort of fee is quite different from a levy, like the Michigan tax, that is unrelated in amount to the expense imposed upon the state by the taxpayer. Cf. *Commonwealth Edison*, 453 U.S. at 622 n.12.

tion; the state simply would have to provide a constitutional "out" for those taxpayers who operate in multiple states. For example, such an out could take the form of apportionment of the tax, or of a reciprocity arrangement with other states that protected against cumulative taxation. See *Scheiner*, 483 U.S. at 282-283 (describing constitutional registration and fuel taxes). Because most taxpayers who are subject to such levies likely perform the taxed activities in a single state (see, *e.g.*, U.S. Br. 19 (noting that many taxpayers subject to such levies "will operate out of fixed locations")), the effect of such accommodations on state taxing systems and revenues would be very limited.

Third, even if it is assumed that the logic of our argument would lead to the invalidation of certain state "occupation[]" and related taxes (see U.S. Br. 18), and even if it is further assumed that this consequence is problematic, that would not provide a reason to uphold the particular tax challenged in this case. As the United States recognizes, it is "plausibl[e]" to "distinguish [occupation] assessments [from the Michigan tax] on the ground that flat fees will likely have a greater *practical* impact on an inherently mobile enterprise like trucking than on, *e.g.*, private detectives, many of whom will operate out of fixed locations regardless of a particular State's licensing rules." U.S. Br. 19 (emphasis in original). That observation surely is correct. Trucks are themselves instrumentalities of interstate commerce; cases involving challenges to taxes on motor carriers have come before the Court so often (see, *e.g.*, *Scheiner*, 483 U.S. at 268-269) precisely because such assessments are the paradigm of the sort of levy that may impede interstate commerce. This Court already has determined, in *Scheiner*, that such taxes are likely to affect the uses to which interstate trucks are put, a conclusion that has been echoed by myriad decisions of the state and federal courts. See Pet. Br. 15-16 n. 6, 18 n.9, 24 (citing cases). In this context, if the interest in preserving existing state taxes militates in favor of limiting the principle of *Scheiner*, any such limitations should not apply to save the Michigan tax on motor carriers in this case.[14]

D. Plaintiffs Are Not Obligated To Make An Empirical Showing That A Flat Tax Impedes Interstate Commerce

Michigan and its *amici* contend that the constitutional challenge here must fail because there has been no empirical demonstration of the Michigan tax's effect on interstate commerce. Resp. Br. 19-22; U.S. Br. 15 & n.8, 19-20, 24. In making this argument, they are a little vague on the showing they believe necessary for a challenge to succeed; they do not explain whether the taxpayer must show the difference in effective rate per-mile on local versus interstate businesses, must show that the tax actually affects the business practices of interstate firms, or both. But whatever their theory, the argument lacks merit.

As we argued in our opening brief (at 28-31), this Court has not insisted on any such evidentiary showing when the challenged tax has a structure that necessarily burdens interstate commerce. To be sure, the Court in *Scheiner* noted evidence that the effective tax rate was higher for out-of-state vehicles than for local ones. 483 U.S. at 276. But this empiri-

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[14] Consider the bar fees mentioned by the United States at U.S. Br. 18. It is not at all clear that it would be feasible to apportion such fees. Unlike trucks, which perform their operations in particular, identifiable states, it is much more difficult to say which states have an interest in imposing a tax (and in which proportionate amounts) when, for example, a lawyer in New York writes a brief at the request of a clients in Virginia and California to be filed in an Oregon court. Moreover, in contrast to the regulation of attorneys, the federal interest is at its height when the state rule burdens inherently mobile instrumentalities of interstate commerce like trucks.

cal evidence was not necessary to the Court's decision; the Court found it plain that, "'[i]n the general average of instances,'" flat taxes discriminate against interstate businesses. *Id.* at 291. The Court reached the same conclusion in *Nippert*, where there was no empirical evidence at all regarding differential effective tax rates. See 327 U.S. at 432; Pet. Br. 19-20. The lower courts uniformly have understood this Court's decisions to not require any such proof. See Pet. Br. 30-31 & n.14 (citing cases).

Nor do the Court's holdings require a demonstration that the challenged levy actually succeeded in discouraging interstate commerce. The Court was not moved by the absence of *any* evidence in *Scheiner* that the routes selected by interstate truckers were affected by the flat Pennsylvania taxes. Similarly, in *Nippert* there was no evidence that Richmond's tax actually dissuaded drummers from peddling their wares in the city. The Court nevertheless invalidated the challenged taxes in those cases because "substantial excluding and discriminatory effects" were their "necessary effects." 327 U.S. at 429, 434.[15] The same conclusion applies here.

E. It Would Not Be Impracticable For The State To Impose A Nondiscriminatory Tax

Michigan complains that requiring apportionment of its tax would be impracticable and would pose insuperable administrative burdens on the State. Resp. Br. 9-13. The United States may have a similar point in mind when it asserts that

[15] Although the State (at Br. 22) notes *Nippert*'s observation that the "practical consequences" of a tax must be considered, the Court's point in the quoted passage was that facial neutrality could not save a tax that has the effect of burdening interstate businesses. See 327 U.S. at 431. Without reference to empirical evidence, the Court proceeded to explain that flat taxes "make[] equality of application as between [interstate and intrastate] commerce, generally speaking, impossible." *Id.* at 432.

the Michigan tax "is assessed for the privilege of engaging in purely intrastate transactions and services, not for use of Michigan's highways," and that there accordingly "is no basis in the Commerce Clause for requiring that the fee be mileage-based." U.S. Br. 24. This argument, too, is without merit.

To begin with, the Michigan tax plainly is apportionable. It is levied on the use of Michigan's roads to make intrastate deliveries; at least in part, its proceeds ostensibly are devoted to providing services related to highway safety that vary according to the volume of road use. See Pet. Br. 3 n.2. There is more than one method that could be used to apportion such a tax so that it does not "penalize" interstate commerce. *Scheiner*, 483 U.S. at 284. For example, such a result plainly could be achieved by varying the tax according to miles traveled while making intrastate deliveries, according to the number of intrastate deliveries made, according to the value of intrastate hauls, or by using similar criteria. Such apportionment would eliminate the forbidden effects that the tax otherwise has on interstate commerce.

Michigan nevertheless argues that apportionment is not feasible because a variety of factors would have to be taken into account to apportion the tax fairly and because there is no data collection system currently in place that tracks miles devoted to intrastate hauls. Resp. Br. 11-12. But the Court rejected a very similar argument in *Scheiner*, explaining that "[t]he administrative machinery of revenue collection for highways is now obviously capable of taking into account at least the gross variations in cost per unit of highway usage." 483 U.S. at 297. Truckers typically bill by the mile, and it would be easy enough for Michigan to require motor carriers to keep track of miles traveled while making intrastate hauls or of the number of intrastate hauls completed. Such a system might not capture every variable, but it surely would reflect

at least the relevant "gross variations in cost per unit of highway usage."

The State and its *amici* get no further in arguing that the Michigan tax effectively is already apportioned because MCL § 478.2(3) gives truckers the option of purchasing a temporary, 72-hour permit for $10, in lieu of the $100 permit required by MCL § 478.2(1). Resp. Br. 12; U.S. Br. 18 n.9; NCSL Br. 22. As Michigan and NCSL acknowledge (at Resp. Br. 2 n.3; NCSL Br. 22 n.10), the State makes this option available only when the trucker *already* has paid the full $100 tax to register a truck for intrastate use and wants to temporarily register an *additional* vehicle. The 72-hour permit therefore is of no value at all to carriers that operate only a single truck or that have only a single vehicle in position to take advantage of episodic business opportunities in Michigan – the very carriers that are most likely to be excluded from the intrastate market by the prospect of having to pay the full flat fee. And even apart from that limitation on its availability, the 72-hour permit hardly achieves fair apportionment; as a practical matter, it requires interstate carriers to pay $10 per intrastate haul, while truckers who operate exclusively intrastate likely pay the tax at an effective rate of far less than a dollar per haul. The temporary permit accordingly is no substitute for a fairly apportioned tax.[16]

[16] The point appears to be confirmed by *Scheiner*. Although Pennsylvania offered a similar temporary permit as a substitute for payment of the flat axle tax (see 483 U.S. at 274 ("the axle tax is excused when a trucker pays $25 for a trip permit for a period not exceeding five days")), and also offered an apportioned rebate to trucks that traveled fewer than 2000 miles in Pennsylvania (see *id.*), the Court did not deem those provisions to save the tax.

F. The Michigan Tax Should Not Be Upheld On The Ground That Its Proceeds Are Used For Regulatory Purposes

Michigan (at Br. 24-28) and NCSL (at Br. 5-19) defend the decision below by arguing that "regulatory fees" are not subject to the Commerce Clause rules articulated in *Complete Auto*. The United States disagrees, labeling this distinction between regulatory fees and taxes "flawed." U.S. Br. 9 n.5. (The United States was less polite in its brief at the certiorari stage, describing the distinction as "meaningless" in "substance and effect." Nos. 03-1230, 03-1234, and 03-1250, Br. for the United States as Amicus Curiae at 13-14.) On this, the United States is correct.

In advancing its regulatory fee argument, the State simply quotes from a handful of lower court decisions that are said to have endorsed the tax/fee distinction. Resp. Br. 24-28. But neither those decisions – nor Michigan in its brief – makes any attempt to explain *why* regulatory fees do not have precisely the same effects on interstate commerce as did the taxes invalidated in *Scheiner*. We argued at some length in our opening brief (at 22-28) that taxes on the one hand, and fees used to pay for regulatory activity on the other, should be subject to the same Commerce Clause analysis; the State offers no response at all.

For its part, NCSL seeks to distinguish *Scheiner* by contending that a state's political processes can be relied upon to check the imposition of excessive regulatory fees because such fees – in contrast, according to NCSL, with general revenue taxes – will fall in large part on in-state interests. NCSL Br. 12-15. As NCSL acknowledges (at Br. 14), however, the Court did not advert to this rationale in *Scheiner* (or in *Nippert*). In any event, even if NCSL's unproven empirical assertion is true, it hardly solves the Commerce Clause prob-

lem. Flat taxes (or "regulatory fees") provide advantages to in-state businesses in their competition with out-of-state and interstate firms; the more business conducted in the taxing state, the greater the competitive advantage provided. There is no reason to believe that the majority of in-state firms affected by such a fee, and provided with these competitive advantages, would object to the fee's structure or amount.

NCSL also contends that this Court has "no reason for intervening" here because the Michigan tax likely will be passed on to Michigan consumers. NCSL Br. 16-18. But this argument cannot support a tax that has impermissible effects on competition across state lines. Under NCSL's rationale, *any* discriminatory tax on out-of-state businesses could be justified on the theory that the affected companies might pass the tax through to the ultimate consumer. In fact, this argument highlights the pernicious effects of the Michigan tax: the competitive disadvantage imposed by the tax will be greatest on interstate firms that pass the tax on to their customers.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the judgment of the Michigan Court of Appeals should be reversed.

Respectfully submitted.

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Nos. 03-1230 and 03-1234

In The
Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC. AND USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

MID-CON FREIGHT SYSTEMS, INC., *et al.*,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The Michigan Court Of Appeals

REPLY BRIEF FOR PETITIONERS MID-CON FREIGHT SYSTEMS, INC., *et al.* No. 03-1234

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ARGUMENT

In their brief on the merits, Respondents attempt to shield the $100 Interstate Decal Fee from preemption by way of two recurring themes. First, Respondents focus on the use to which the fee revenues are put and portray Petitioners' claim as an assault on a State safety regulatory program unrelated to the Single State Registration System ("SSRS"). Second, Respondents suggest that the $100 fee is little more than a vehicle registration fee – again untouched by the SSRS – and justified by the Michigan license-plating of vehicles. Neither the use of the fee's revenues nor the Michigan plating of a truck, however, can obscure the fact that Michigan's exaction of the Interstate Decal Fee is a "registration requirement" in excess of the SSRS standards and is therefore preempted by 49 U.S.C. § 14504 ("Section 14504").

A. Michigan Law Imposes A "Registration Requirement" In Excess Of That Permitted By The SSRS, Notwithstanding The Use To Which The Interstate Decal Fee Revenues Are Put

1. At the outset, it should be made plain that this case does *not* involve a challenge to a State safety regulatory program. Rather, this case concerns the federal regulation of matters affecting interstate commerce, and what Petitioners challenge is Michigan's registration of interstate motor carriers in ways that conflict directly with the SSRS standards established by federal law. Under Section 14504, a State requirement that an interstate carrier must "register with the State" is not an unreasonable burden on interstate transportation when the "State registration" is completed under the SSRS standards; however, "[w]hen a State registration requirement imposes obligations in

excess of the standards . . . , the part in excess *is* an unreasonable burden [on interstate transportation]" and is consequently preempted. 49 U.S.C. § 14504(b) (emphasis supplied). Therefore, notwithstanding Michigan's later use of the funds, the operative question presented is whether assessment of the Interstate Decal Fee in the first instance is a prohibited "registration requirement" within the meaning of Section 14504.[1]

There is nothing unique about the use to which Interstate Decal Fee revenues are put. Indeed, Michigan's $10 SSRS fee itself, after first being designated in part to the Michigan Truck Safety Fund under Mich. Comp. Laws § 478.7(5), is combined with all other fee revenue collected by the Michigan Public Service Commission ("PSC") and assigned to the same "regulatory" purposes Respondents so heavily emphasize. J.A. 12; 28. So too, parenthetically, is a portion of Michigan's license-plating fee, but that fee would still be subject to legal challenge if it were not apportioned on a mileage basis because, under the International Registration Plan ("IRP"), plating fees must be apportioned no matter how the fees are used. *See* Mich. Comp. Laws § 257.801(1)(k) (assigning a $15 portion of plating fees to the Michigan Truck Safety Fund). *Compare*

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[1] The reason for Respondents' talismanic invocation of a "truck safety" theme is transparent. They hope to obtain the benefit of a presumption against preemption applied when the historic police powers of the States are in question. *See United States v. Locke*, 529 U.S. 89, 108 (2000) (distinguishing regulatory arenas in which there has been a long history of significant federal presence); *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 430 (2002) (applying an assumption that the police powers of the States are not preempted in interpreting an express safety exception to the provisions of 49 U.S.C. § 14501 otherwise preempting State regulation of intrastate motor carrier activities). This case poses no such question.

International Registration Plan, Art. III, § 300 (2004 rev.) (requiring apportionment of each IRP's State's vehicle registration fee) *with* Mich. Comp. Laws § 257.801g(1) (authorizing apportionment of plating fees under the IRP).

This Court long ago dismissed "the aberrational doctrine . . . that state law may frustrate the operation of federal law so long as the state legislature in passing its law had some purpose in mind other than one of frustration." *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971). As the Court explained,

> such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy – other than frustration of the federal objective – that would be tangentially furthered by the proposed state law.

Id. at 652.[2] In short, "[w]hatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 107 (1992). The relevant inquiry in this case, therefore, is not whether Michigan's $100 fee is charged "for" a safety regulatory program or even "for" filing proof of insurance within the literal terms of Section 14504. What matters is whether the means,

[2] The Court's analysis refutes as immaterial Respondents' contention that "the Michigan Legislature expressly differentiated" between the "annual" Interstate Decal Fee and the SSRS "registration" fee when it set forth the effective date of statutory amendments in Mich. Comp. Laws § 478.8 (*Respondents' Brief* at 41).

manner, and incidence of the charge comply with what federal law demands.

2. Respondent's brief fails to address the mechanism by which the Interstate Decal Fee is assessed and thus disregards the obvious parallels between the Michigan fee-collection regime and the federal standards for SSRS registration. Those parallels reveal that the Michigan scheme imposes an interstate motor carrier "registration requirement" that mirrors – but conflicts with – the SSRS in four important ways.

First, although the SSRS authorizes State registration of interstate motor carriers, "a motor carrier is required to register annually with only one State," and "such single State registration shall be deemed to satisfy the registration requirements of *all* other States." 49 U.S.C. § 14504(c)(1)(A); (C) (emphasis supplied). Michigan law, however, requires all interstate motor carriers using Michigan-plated vehicles to register with the PSC – *i.e.*, to present and identify themselves on an additional PSC "Equipment List Form" – even if a motor carrier is properly SSRS-registered in another SSRS State.[3]

[3] As previously shown (*Petitioners' Brief* at 15, n.13), an interstate carrier may be SSRS-registered in one State while purchasing its license plates in another because, under 49 C.F.R. § 367.3, the "base" State for SSRS purposes is generally a carrier's *principal* place of business whereas, under the International Registration Plan, Art. II, §§ 210, 218 (2004 rev.), the "base" jurisdiction for IRP plating can be any State in which *a* place of business exists. In addition, an interstate carrier already SSRS-registered in Ohio may use leased motor vehicles that are plated by the lessor/owner in Michigan, in which event the interstate carrier must *also* register with the PSC on its Equipment List Form and pay the $100 fee on each leased vehicle. The Equipment

(Continued on following page)

Second, although the SSRS permits the collection of a per-truck fee in connection with interstate motor carrier registration, "only a State acting in its capacity as a registration State under [the] single State system may require a motor carrier . . . to pay directly to such State fee amounts in accordance with the fee system established [by Section 14504], subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system." 49 U.S.C. § 14504(c)(2)(A)(iii). Michigan, however, whether acting in its capacity as an SSRS registration State or participating State, collects its own per-truck fee for itself as an additional flat fee entry barrier to interstate operations on and over Michigan highways.

Third, while the SSRS directs States to identify for purposes of fee collection "the number of commercial motor vehicles the carrier operates in a State," it expressly prohibits the use of "decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by the carrier." 49 U.S.C. § 14504(c)(2)(B)(iii); (iv)(I). Michigan's PSC, however, requires interstate carriers using Michigan-plated trucks to schedule each truck by make, model, and serial number and to obtain a vehicle-identifying decal for each.

Fourth, the SSRS permits the collection of a "fee for each participating State that is . . . not to exceed $10 per vehicle" and declares that "[t]he charging or collection of *any* fee under this section that is not in accordance with the fee system established [herein] shall be deemed to be a

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List Form may be viewed at <http://www.michigan.gov/mpsc> ("Motor Carrier: All Forms") (viewed April 13, 2005).

burden on interstate commerce." 49 U.S.C. § 14504(c)(2)(B)(iv)(III); (C) (emphasis supplied). Michigan, however, charges and collects a $100-per-vehicle fee from interstate carriers operating Michigan-plated trucks.

Although not expressly identified by the Michigan legislature as a charge "for" filing proof of insurance or registering a motor carrier's operating authority, the manner by which the Interstate Decal Fee is collected *is* quite literally a State "registration requirement" for interstate motor carriers that conflicts with Section 14504. In this regard, preemption analysis discerns legislative intent by applying logical, plain-meaning understandings to the effect of Congress's words. Thus, for example, a prohibition against cigarette advertising "requirements and prohibitions" quite naturally encompasses State laws regulating advertising content and location alike, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 548 (2001), and a preemptive strike against vehicle emissions "standards" is just as applicable to restrictions on vehicle purchases as it is to restrictions on sales. *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 124 S.Ct. 1756, 1762 (2004). Likewise, Michigan's law requiring an interstate carrier to present and identify itself to the PSC and pay a per-truck fee "for" regulatory funding is just as much a "registration requirement" as is a law requiring the same carrier to identify itself to the same commission and make its per-truck payment "for" the filing of proof of insurance. Both procedures serve as the interstate carrier's registration – the securing of its ticket or pass into the State – and both are governed by Section 14504's broad preemptive sweep.

Michigan Comp. Laws § 478.7(4) provides evidence of the convenient "form over substance" nature of Respondents'

argument. That statutory provision, which assesses Michigan's $10 fee on interstate carriers, does not include any legislative directive that the fee is charged "for" filing of proof of insurance. Yet, Respondents identify Mich. Comp. Laws § 478.7(4) as the law through which "Michigan has complied with the SSRS" (*Respondents' Brief* at 47) even though the statute says nothing about insurance filings and makes no mention of the SSRS. *See also Schneider Nat'l Carriers, Inc. v. State*, 247 Mich.App. 716, 637 N.W.2d 838, 839-40 (2001), *vacated on other grounds*, 468 Mich. 862, 659 N.W.2d 228 (2003) (agreeing with Respondents that the PSC may collect the $10 charge as its SSRS fee even without express legislative direction authorizing collection of the fee "for" an insurance filing). Similarly, assessment of the $100 Interstate Decal Fee under Mich. Comp. Laws § 478.2(2) is no less a "registration requirement" merely because the statute makes no reference to proof of insurance.

3. As the United States observes (*U.S. Brief* at 22), even if the Interstate Decal Fee does not meet a narrow definition of a "registration requirement" expressly preempted by Section 14504, it is still impliedly preempted because it contravenes and frustrates the purpose of the SSRS, not to mention the more general regulatory authority of the Federal Motor Carrier Safety Administration ("FMCSA") to license the for-hire truck transportation of goods moving in interstate commerce.[4] On this point, we

[4] The categories of preemption analysis are not "rigidly distinct." *English v. General Electric Co.*, 496 U.S. 72, 79 n.5 (1990). In addition, a declaration of express preemptive intent by Congress does not foreclose application of conflict preemption principles as well. *Compare Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (Congressional language "defining the pre-emptive reach of a statute implies

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may easily dismiss Respondents' comment that carriers can effectively comply with both state and federal law (*Respondents' Brief* at 38-39) because a finding of conflict preemption does not depend on the impossibility of concurrent compliance. *Geier*, 529 U.S. at 873. Instead, we need only note as we have before that a conflict exists because exaction of the Interstate Decal Fee "stands as an obstacle" to full implementation of the SSRS and otherwise frustrates the accomplishment of federal law. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Geier*, 529 U.S. at 873.

Respondents selectively emphasize only a portion of the legislative history for the predecessor "bingo card" program and overlook the legislative gloss attendant to the SSRS itself. Certainly, Congress was concerned about illegal trucking (largely because of the harm caused to authorized carriers) when the "bingo card" program was authorized in 1965, but it also sought to afford interstate carriers "relief from [a] multiplicity of different State registration requirements" by establishing a *uniform* registration procedure. H.R. Rep. No. 89-253 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2923, 2929. In addition, by the time the SSRS was adopted in 1991, the House Conferees were most concerned about industry estimates that the "bingo card" program was costing carriers "up to $250 million per year." H.R. Conf. Rep. No. 102-404 (1991),

that matters beyond that reach are not pre-empted") *with Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (distinguishing *Cipollone* and ruling that an express preemption clause does not "entirely foreclose[] any possibility of implied pre-emption"). *See also Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (ruling that neither an express preemption provision nor a saving clause bars application of ordinary conflict preemption rules).

reprinted in 1991 U.S.C.C.A.N. 1679, 1817.[5] Thus, the SSRS was implemented as a new "streamlined administrative process" "intended to benefit the interstate carriers by eliminating unnecessary compliance burdens" through a single State registration procedure. H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1817-1818. Perhaps most important is Section 14504 itself and its declaration of Congress's intent to "establish a fee system . . . that . . . *minimizes* the costs of complying with the [State] registration system . . . " by way of directive to the Secretary of Transportation. 49 U.S.C. § 14504(c)(2)(B)(iv)(II) (emphasis supplied).

Michigan's assessment of the Interstate Decal Fee conflicts directly with Congress's purpose. It establishes a *non-uniform* registration procedure different from that permitted by the SSRS, imposes an *additional* registration requirement on some carriers already SSRS-registered in other States, and most obviously *increases* interstate carrier costs by imposing a per-truck fee ten times the $10 fee cap established by federal law. Furthermore, the Michigan Court of Appeals decision upholding the fee invites other States to enact so-called "regulatory fees" and associated registration procedures standing as barricades to interstate trucking at borders throughout the country.

It is, in the end, commerce among the States that is at issue here, and it is Congress and its chosen designee – the FMCSA – that possess the constitutional authority to

[5] Indeed, the House Public Works and Transportation Committee originally proposed to preempt State registration of interstate carriers altogether, believing it to be a "costly mechanism which does not serve a purpose that justifies its cost." H.R. Rep. No. 102-171(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 1526, 1575.

regulate interstate commerce and authorize for-hire interstate trucking in and across the Nation. As a result, although Michigan has the unquestioned authority to oversee matters of highway safety within its boundaries, it may not invoke that authority to single out interstate carriers for imposition of burdensome registration requirements that block interstate commercial activity the FMCSA has sanctioned pursuant to federal law. *Cf. Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 64 (1954) (State size and weight laws may not be used to revoke or suspend a motor carrier's right to engage in federally-authorized interstate activities). The Interstate Decal Fee is not rescued by the use to which it is put because, whatever its purpose, it stands in direct conflict with Section 14504's declaration that any "registration requirement" exceeding the SSRS standards and any flat fee exceeding $10 per vehicle is a burden on interstate commerce.

B. Limiting The $100 Registration Requirement To Interstate Carriers Operating Michigan-Plated Trucks Does Not Save The Interstate Decal Fee From Preemption

1. In a further attempt to distinguish assessment of the Interstate Decal Fee from the carrier registration standards established by Section 14504, Respondents would have the Court view the flat $100 charge as a mere vehicle fee associated with the license-plating of trucks in Michigan. Michigan's fee-imposing procedure, however, is not mere vehicle registration. Rather, it is interstate *carrier* registration by the very motor carrier regulatory agency at which the SSRS mandate is directed. The United States is therefore unquestionably correct that Michigan's fee is "imposed on interstate carriers *by reason*

of their operation in interstate commerce" (*U.S. Brief* at 20) and is thus preempted by Section 14504.

That the Interstate Decal Fee is imposed upon interstate *carriers*, not vehicles, is evident from both the Michigan fee-imposing statute and the vehicle-leasing example described earlier (*supra* at 4, n.3). By its literal terms, Mich. Comp. Laws § 478.2(2) requires "[a] *motor carrier*" to pay the annual $100 fee "for each vehicle operated by the motor carrier which is registered in this State and operated entirely in interstate commerce." (Emphasis supplied). Thus, in a truck-leasing scenario, even if an interstate carrier is properly SSRS-registered in another State, Michigan law seeks out that carrier for registration on the PSC's Equipment List Form and requires a fee not from the truck owner/lessor purchasing license plates in Michigan, but from the interstate *motor carrier* leasing the trucks. And it is Michigan's PSC – the State's *motor carrier* regulatory body – that carries out the registration process and assesses the fee, potentially subjecting any non-complying interstate carrier to fines of up to $500 for each violation plus the PSC-impounding of vehicles and injunctive relief as well. *See* Mich. Comp. Laws §§ 479.12; 479.16; 479.19.

In contrast, *vehicle* registration in Michigan – including the plating of passenger cars and pick-up trucks and the IRP-plating of commercial motor vehicles operated by for-hire and private carriers alike – is administered by the Michigan Secretary of State, and *vehicle* registration requirements are generally imposed upon the vehicle *owner*. Mich. Comp. Laws § 257.217(1) ("owner of a vehicle that is subject to registration . . . shall apply to the Secretary of

State").[6] The Interstate Decal Fee, however, has nothing to do with vehicle ownership. Rather, the fee is imposed only on a for-hire interstate carrier as a condition of operating any vehicle in interstate commerce on Michigan highways and roads. Mich. Comp. Laws § 478.2(2) (requiring fee payment by the "motor carrier" "for each vehicle operated" "in interstate commerce"); § 478.7(1) (prohibiting interstate transportation unless for-hire carriers have "registered with the [PSC] and paid the required registration and vehicle fees").

2. Nor can the Interstate Decal Fee be justified as a "plating" fee based on Respondents' reference to the intrastate fee assessed under Mich. Comp. Laws § 478.2(1). Any notion that Mich. Comp. Laws § 478.2(1) and § 478.2(2) collectively impose a vehicle plating charge on all motor carrier vehicles is contradicted by Respondents' acknowledgment (*Respondents' Brief* at 44, n.7) that the $100 fee under Mich. Comp Laws § 478.2(1) is assessed against *all* intrastate-operating motor carriers regardless of the State in which their vehicles are plated. As Respondents explain in defense of *that* fee, Mich. Comp. Laws § 478.2(1) requires payment of the $100 intrastate fee "for the privilege of making intrastate deliveries" (*Respondents' Brief* at 21), not for the purchase of a license plate. The only logical construction of the statute, therefore, is that the fee under subsection (1) of Mich. Comp. Laws § 478.2 is charged because the carrier operates intrastate, while the fee under subsection (2) is levied because the carrier operates interstate. In other

[6] Under the IRP, rules do exist for permitting motor carriers using leased vehicles to assume the owner's vehicle plating obligation. *See generally* International Registration Plan, Art. IX, § 904 (2004 rev.).

words, the distinction between two motor carriers subjected to the separately-imposed fees is that the first is assessed *on account of* its intrastate operations and the second is assessed *on account of* its exclusively interstate activities.[7]

The statutory provisions *in pari materia* here do not include Mich. Comp. Laws § 478.2(1). Rather, the three statutes that should be read together begin with Mich. Comp. Laws § 478.7(1), which imposes a registration requirement upon all for-hire interstate carriers by prohibiting them from engaging in the interstate transportation of property in Michigan "without first having *registered* with the [PSC] and paid the required registration and vehicle fees." (Emphasis supplied). Next is Mich. Comp. Laws § 478.7(4), upon which the PSC bases the $10 registration and vehicle fee charged to interstate carriers operating trucks plated out of State. Finally there is Mich. Comp. Laws § 478.2(2), which requires a $100 registration and vehicle fee from interstate carriers using trucks plated in Michigan. Read together, the statutes demonstrate that, when the PSC registers for-hire interstate carriers, Michigan law complies with the $10 fee cap under Section 14504 for some – but not all – of those registrations.

In practice and effect, Michigan law requires registration and Interstate Decal Fee payment of Petitioners and their fellow class members because they operate in interstate commerce, which is exactly what Section 14504

[7] In addition, as the United States observes (*U.S. Brief* at 28), the charging of both fees on a flat per-truck basis demonstrates that neither fee can be construed as anything in the nature of a license-plating charge because plating fees must be apportioned under both the IRP and Michigan law.

prohibits unless carried out in accordance with the SSRS. The fact that only some interstate carriers (those using Michigan-plated trucks) are charged a fee exceeding the $10 federal fee cap does not mean that the SSRS is any less preemptive of Michigan law. *Cf. American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 282 (1987) (Pennsylvania's flat truck taxes discriminated against "*some* participants in interstate commerce" in contradiction of the dormant Commerce Clause) (emphasis supplied). Accordingly, even if the Michigan Court of Appeals ruling had acknowledged Respondents' theory that the Michigan plating of a truck creates a "presence"-related basis for the charge, limiting the $100 fee to interstate carriers operating trucks with Michigan plates does not save the fee from preemption.[8]

[8] Notably, Respondents do not take issue with our point (*Petitioners' Brief* at 27) that the IRP base-plating of a truck in any particular State has little to do with the truck's "presence" there. Also, it is not certain that Michigan always draws a clear line of demarcation between Michigan-plated carriers and those that plate their trucks elsewhere. Respondents take issue with our comment that the PSC "waives" the $10 SSRS fee for carriers operating Michigan-plated trucks, contending that under Mich. Comp. Laws § 478.7(4) the PSC's authority for the $10 fee is limited to carriers using trucks plated outside Michigan (*Respondents' Brief* at 40-41). Notwithstanding the Michigan Court of Appeals plain statement that the PSC "waives" the $10 fee on Michigan-plated trucks (J.A. 83, n.6) and despite the Michigan SSRS form's direction to Michigan-plated carriers to pay $100 in lieu of $10 (J.A. 67), it appears that Michigan permits other SSRS States to collect the $10 fee from *all* interstate carriers regardless of where their trucks are plated. A survey of SSRS forms used in the Midwest, for example, reveals that all interstate carriers, wherever their trucks are plated, are directed by Iowa, Kansas, Kentucky, and Ohio to pay $10 for each truck operated in Michigan. *See* <http://www.iadotforms.dot.state.ia.us/iowadotforms/Library.aspx> ("Blank Forms; Motor Carrier Services") (viewed April 13, 2005); <http://www.kcc.state.ks.us/trans/forms.htm> ("Kansas Trucking Application") viewed April 13,

(Continued on following page)

The Interstate Decal Fee, therefore, is no better defended by its imposition upon a subgroup of interstate carriers than it is by the use to which it is put. Whether called a "plating charge" or a "regulatory fee," the $100 fee and its assessment are governed by Section 14504 because they serve to register motor carriers with the PSC for purposes of authorizing exclusively interstate activities in Michigan. Under Section 14504, Congress declared that non-conforming State registration requirements are a burden on interstate commerce and thereby made the SSRS standards preemptive in force and effect. Consequently, because it exceeds the SSRS standards, the $100 Interstate Decal Fee is preempted.

2005): <http://www.transportation.ky.gov/dmc/forms_applications.htm> ("Kentucky Transportation Application") (viewed April 13, 2005); <http://www.puco.ohio.gov/PUCO/IndustryTopics/Topic.cfm?doc_id=273> ("Interstate Single State Registration Packets – Property") (viewed April 13, 2005). *See Schneider*, 247 Mich.App. 716, 637 N.W.2d 838 (ordering $10 refunds to carriers that paid both $10 and $100 on the same vehicles). Therefore, it appears that some interstate carriers using Michigan-plated trucks are paying Michigan not $10 or $100, but $110 per truck annually, which cannot be squared with any of the statutory analysis or the anecdotal justification employed by Respondents in defense of Michigan's fees.

CONCLUSION

For the foregoing reasons, the decision of the Michigan Court of Appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC., PETITIONERS

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The State of Michigan imposes upon all motor carriers a $100 annual fee for each vehicle that operates at least in part in intrastate transportation (*i.e.*, that performs at least one point-to-point haul within the State). Mich. Comp. Laws Ann. § 478.2(1) (West 2002). The question presented is as follows:

Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. "The negative or dormant implication of the Commerce Clause prohibits state taxation, or regulation, that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace." *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 287 (1997) (citations, brackets, and internal quotation marks omitted). In *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987), this Court struck down two "flat" taxes imposed by Pennsylvania as preconditions to the use of the

State's roads by commercial motor vehicles—a "marker fee" and an "axle tax," neither of which varied in amount depending on the number of miles that a particular vehicle traveled within the State. See *id.* at 273-274. The Court offered two bases for its invalidation of the taxes.

First, the Court found that the challenged flat taxes discriminated against out-of-state businesses. The Court relied in part on record evidence showing that, "[o]n the average, the Pennsylvania-based vehicles subject to the flat taxes travel about five times as many miles on Pennsylvania roads as do the out-of-state vehicles; correspondingly, the cost per mile of each of the flat taxes is approximately five times as high for out-of-state vehicles as for local vehicles." 483 U.S. at 276. The Court concluded that, "[a]lthough out-of-state carriers obtain a privilege to use Pennsylvania's highways that is nominally equivalent to that which local carriers receive, imposition of the flat taxes for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause." *Id.* at 296; see *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 198 (1995) (explaining that the taxes at issue in *Scheiner* were held to discriminate against interstate travel "by imposing a cost per mile upon out-of-state trucks far exceeding the cost per mile borne by local trucks that generally traveled more miles on Pennsylvania roads").

The Court in *Scheiner* also held (483 U.S. at 284-285) that the challenged flat taxes violated the "internal consistency" prong of the "fair apportionment" requirement that the Court has applied to state taxes levied on interstate commercial activity. See, *e.g.*, *Jefferson Lines*, 514 U.S. at 185 ("Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear."). The *Scheiner* Court explained that, "[i]f each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." 483 U.S. at 284. *Scheiner*'s discussion of internal consistency was closely linked to its determination that the Pennsylvania flat taxes discriminated against out-of-state carriers. See *id.* at 285-286. The Court's reference to the possible cumulative impacts of multiple flat taxes, however, suggests the related but distinct concern that a proliferation of such taxes would impose increasing burdens on vehicles operating in a large number of States, thus impeding the ability of interstate carriers to engage in unfettered "travel within the free trade area" established by the Commerce Clause. *Id.* at 284; see *id.* at 285 nn.19 & 20.

2. The instant case presents a constitutional challenge to Mich. Comp. Laws Ann. (MCL) § 478.2(1) (West 2002), which imposes "an annual fee of $100.00 for each self-propelled motor vehicle operated by or on behalf of" a licensed motor carrier. On its face, Section 478.2(1) does not make the applicability of the fee dependent on the nature of the routes that a particular vehicle travels. It is undisputed, however, that the State assesses the fee only upon vehicles that engage at least in part in "intrastate" operations—*i.e.*, vehicles that make at least one delivery between two points within the State of Michigan. See J.A. 22-23; Pet. Br. 2. Relying substantially on this Court's decision in *Scheiner*, petitioners contend that, because MCL § 478.2(1) imposes a "flat" $100 annual fee for intrastate operations, without regard to the mileage a particular vehicle travels within the State, the provision violates the Commerce Clause of the United States Constitution, Art. I, § 8, Cl. 3.[1]

---

[1] Petitioners contend (Br. 3) that "a truck that accrues virtually all of its annual mileage traveling interstate, but makes a single intrastate delivery while passing through Michigan by hauling a load between two

3. The Michigan Court of Claims upheld MCL § 478.2(1) against petitioners' Commerce Clause challenge. Pet. App. 42a-45a. The court noted that "the flat taxes in *Scheiner* applied across the board to any vehicle traveling the state's highways, whereas the fee here is exacted only of those vehicles, foreign or domestic, that the carrier chooses to operate in point-to-point intrastate Michigan service." *Id.* at 44a. The court further observed that the state interest served by the fee—*i.e.*, "ensuring that vehicles and carriers operating on Michigan highways in intrastate service comply with [the State's] safety and fitness norms"—"does not have a prejudicial effect on interstate commerce." *Ibid.* In its subsequent denial of reconsideration, the court stated that the "per-vehicle intrastate decal fee of $100 did not violate the dormant Commerce Clause since it could not impermissibly discriminate against interstate motor carriers where the fee is based purely on Michigan boundaries having no economic relevance for interstate traffic." *Id.* at 59a.

4. The Michigan Court of Appeals affirmed. J.A. 68-102. In holding that the fee imposed by MCL § 478.2(1) does not violate the Commerce Clause (J.A. 98-102), the court found that the challenged provision regulates licensed motor carri-

points in the State[,] * * * is obligated to pay the full $100 Michigan tax." Petitioners further assert (Br. 3-4) that "[t]he only way for the interstate truck to avoid payment of the Michigan tax would be for it to forgo intrastate business while it is passing through Michigan." Those statements are incorrect. The Michigan Public Service Commission (MPSC) is authorized to issue the trucking equivalent of a pro hac vice admission—*viz.* "a temporary 72-hour permit for the operation of a vehicle subject to rules and conditions of the [MPSC] at a fee of $10.00, which is in place of any other fee otherwise required." MCL § 478.2(3); see J.A. 63 (respondents' affiant states that, under Section 478.2(3), "[w]hen an intrastate business opportunity arises, a motor carrier can obtain a $10.00 temporary permit"). The record appears to contain no evidence regarding the precise mechanism for obtaining a temporary permit or the manner in which Section 478.2(3) is administered.

ers evenhandedly and does not discriminate against interstate commerce. J.A. 99-101. The court declined to apply the four-part test articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), and subsequently applied in *Scheiner*.[2] The court stated that "this test is used to analyze the constitutionality of state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, not regulatory statutes." J.A. 99 n.15 (citation omitted). The court's characterization of MCL § 478.2(1) as a "regulatory" fee was apparently based on the facts that (a) the fee, once collected, is used to support enforcement of the State's Motor Carrier Act, and (b) the aggregate amount of fees collected from motor carriers is roughly proportional to the cost of administering the State's regulatory program. See J.A. 83, 93-95.

With respect to the practical impact of the challenged fee, the Michigan Court of Appeals observed that petitioners had "present[ed] no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could occur in the hypothetical." J.A. 101. Applying the test set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), to evaluate state statutes that regulate evenhandedly to effectuate a legitimate local public interest, the court concluded that, "[o]n the basis of the record before us, we cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on

[2] Under the framework described in *Complete Auto Transit*, this Court "ha[s] sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279.

its highways. Therefore, we hold that MCL 478.2(1) does not violate the Commerce Clause." J.A. 102.[3]

5. The Michigan Supreme Court denied petitioners' application for leave to appeal. Pet. App. 61a-63a.

SUMMARY OF ARGUMENT

A. This Court has long recognized the authority of States and municipalities to require payment of flat fees by commercial motor carriers that make point-to-point deliveries within the local jurisdiction. Contrary to petitioners' contention, the jurisprudential principles on which those holdings rest have not been superseded by more recent Commerce Clause decisions.

B. Although a fee imposed for permission to conduct point-to-point hauls within a State might in theory have an indirect impact upon a carrier's *interstate* operations, petitioners have offered no evidence that MCL § 478.2(1) has actually produced such consequences. This Court has identified certain events (most notably the sale of goods or services) that, even when performed in connection with interstate commerce, are sufficiently discrete and separate from

[3] Under MCL § 478.2(2), the State also imposes "an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in [Michigan] and operating entirely in interstate commerce." In the courts below, that provision was the subject of a separate challenge brought by plaintiffs who contended that the fee is preempted by 49 U.S.C. 14504, which establishes a Single State Registration System (SSRS) for trucks operating in interstate commerce and imposes a $10-per-vehicle limit on the fee that a State may charge in connection with the SSRS program. The Michigan Court of Appeals held that Section 478.2(2) is not preempted by federal law, see J.A. 73-87, and this Court has granted certiorari to review the question. See *Mid-Con Freight Sys., Inc.* v. *Michigan Pub. Serv. Comm'n*, No. 03-1234 (Jan. 14, 2005). The brief for the United States as amicus curiae in *Mid-Con* argues that MCL § 478.2(2) is preempted by 49 U.S.C. 14504 and that the state court's judgment in the case should be reversed. See note 7, *infra*.

the interstate activity as to be fully taxable by the State in which they occur. The conduct of point-to-point transportation within a State is properly regarded as one such event. That conclusion is reinforced by the history of state regulation of intrastate shipping and by 49 U.S.C. 13501, which defines the regulatory jurisdiction of the Secretary of Transportation and the Surface Transportation Board in a way that *excludes* such intrastate motor carriage.

C. Acceptance of petitioners' constitutional theory would cast serious doubt upon a wide range of occupational licensing fees, since States and localities routinely charge flat fees for a privilege that is inherently more valuable to a full-time operator than to one who proposes to engage in the relevant business in many jurisdictions during the course of a year. In its so-called "peddler" cases, this Court has repeatedly sustained such licensing requirements against Commerce Clause attack. The instant suit, which concerns a fee for point-to-point carriage within the State of Michigan, rather than a barrier to solicitation of interstate business, is more closely analogous to those "peddler" cases than to the "drummer" cases, such as *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946), on which petitioners rely.

D. This Court's decision in *Scheiner* does not require invalidation of the fee imposed by MCL § 478.2(1). Unlike the fees at issue in *Scheiner*, payment of which was a legal prerequisite to the conduct within Pennsylvania of *interstate commerce* using the covered motor vehicles, MCL § 478.2(1) applies only to vehicles used for point-to-point hauls within Michigan. Neither record evidence nor abstract logic establishes that Section 478.2(1) will impose disproportionate burdens upon interstate operators as a class. The prospect that some individual carriers might be deterred from undertaking point-to-point hauls within the State by reason of the evenhanded $100 fee is not, standing alone, a sufficient basis for declaring the law unconstitutional.

ARGUMENT

Relying primarily on this Court's decision in *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987), petitioners contend that the $100-per-vehicle annual fee imposed by MCL § 478.2(1) violates the Commerce Clause. In arguing that MCL § 478.2(1) shares the same constitutional defects as the flat fees that were struck down in *Scheiner*, petitioners contend (i) that Section 478.2(1) discriminates against interstate commerce because trucks engaged primarily in interstate deliveries are charged the same fee as vehicles engaged wholly in intrastate commerce but are likely to make fewer point-to-point hauls within Michigan during the course of a year, and (ii) that the imposition of similar charges by other States would place substantial cumulative burdens on trucks that make point-to-point hauls in many jurisdictions. See, *e.g.*, Pet. Br. 13.[4]

[4] This Court's decisions identify two distinct senses in which a state law may be said to discriminate against interstate commerce. First, and most obviously, "States are barred from discriminating against foreign enterprises competing with local businesses." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 197 (1995); see *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 99 (1994) (The term "discrimination" refers in this context to "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."). Second, the Court has held that a State impermissibly "discriminates against interstate commerce" when it "distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market," even when each of the entities involved is based in the same State. *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 576 (1997). Petitioners principally allege the second form of discrimination. The primary thrust of their argument is not that MCL § 478.2(1) discriminates against companies headquartered (or vehicles license-plated) outside the State of Michigan, but that it favors companies and vehicles that do a wholly intrastate business over those that also operate interstate, and places particularly severe burdens on companies and vehicles that operate in a large number of States. See, *e.g.*, Pet. Br. 2 (arguing that the fee imposed by MCL § 478.2(1) "necessarily applies at a much lower effective rate to trucks that confine their operations to Michigan than it does to otherwise identical vehicles that operate interstate").

For the reasons that follow, petitioners' constitutional claim lacks merit. This Court has repeatedly sustained against Commerce Clause challenge state and local requirements, including flat licensing fees, imposed on persons engaged in intrastate carriage or other local business. Because MCL § 478.2(1) applies only to commercial trucks that make point-to-point hauls within the State of Michigan, its effect on interstate commerce is considerably more indirect and attenuated than was the case in *Scheiner*, where payment of the challenged assessments was a legal prerequisite to *any* use of Pennsylvania roads by the covered motor vehicles.[5]

A. This Court Has Upheld The Authority Of States And Localities To Impose Flat Licensing Fees For Permission To Carry Goods Or Passengers Between Points Within The Local Jurisdiction

1. This Court has previously sustained, against Commerce Clause challenge, state and local exactions not mean-

[5] Although the Michigan Court of Appeals' ultimate disposition of this case was correct, one aspect of its analysis was flawed. In distinguishing this case from *Scheiner*, the court relied in part on MCL § 478.2(1)'s purported status as a "regulatory statute[]." J.A. 99 n.15. That characterization of the challenged law appears to have been based on the State's use of the collected fees to enforce Michigan's Motor Carrier Act, and on the rough correspondence between the aggregate amount of fees collected from motor carriers and the cost of administering the State's regulatory program. See J.A. 83, 93-95. Nothing in *Scheiner* suggests, however, that the propriety of a state fee or tax that would otherwise fall within the scope of that decision turns on the use to which the money is put after the fee has been collected. To the contrary, the Court in *Scheiner* noted that the flat taxes at issue were used by the State for highway-related purposes, see 483 U.S. at 270-271, yet it nevertheless held the taxes unconstitutional.

ingfully different from the fee imposed by MCL § 478.2(1). In *Osborne* v. *Florida*, 164 U.S. 650 (1897), the Court addressed a factual setting strikingly similar to the circumstances of this case. The Florida statute at issue in *Osborne* imposed a yearly license tax on "all express companies doing business in this State." *Id.* at 653. Despite the facial applicability of the tax to companies engaged solely in interstate deliveries, the Florida Supreme Court had authoritatively construed the law to apply solely to business "'local' in its character," and had held that "so long as [an] express company confines its operations to express business that consists of interstate or foreign commerce, it is wholly exempt from the legislation in question." *Id.* at 654.

This Court held that the Florida statute, so construed, "does not in any manner violate the Federal Constitution." 164 U.S. at 654. The Court explained that, "[s]o long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute." *Id.* at 655. The Court distinguished prior cases in which state licensing fees on out-of-state express companies had been declared invalid, explaining that those laws "prohibited the doing of any business in the State whatever unless upon the payment of the fee or tax," and thereby burdened the companies' interstate operations. *Ibid.*; see, *e.g.*, *Bode* v. *Barrett*, 344 U.S. 583, 585 (1953); *Allen* v. *Pullman's Palace Car Co.*, 191 U.S. 171, 181-183 (1903); *Pullman Co.* v. *Adams*, 189 U.S. 420, 422 (1903).

The Court drew the same distinction in *Sprout* v. *City of South Bend*, 277 U.S. 163 (1928), though in that case the challenged assessment was held to be invalid. *Sprout* involved a $50 annual license fee imposed by South Bend, Indiana, upon the operator of a bus that carried passengers between South Bend and Niles, Michigan. *Id.* at 166-167. In

considering whether the license fee could be sustained as an "occupation tax," the Court explained:

> A State may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. And it may delegate a part of that power to a municipality. But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.

Id. at 170-171.

Because the state supreme court had construed the challenged ordinance as applicable "to busses engaged exclusively in interstate commerce," this Court held the fee to be invalid. 277 U.S. at 171. The Court's description of a permissible "occupation tax," however, unquestionably encompasses the fee imposed by MCL § 478.2(1). As construed by Michigan authorities, Section 478.2(1) applies only to vehicles that undertake point-to-point hauls within the State; the $100-per-vehicle fee that it imposes does not increase in amount by virtue of a carrier's parallel interstate operations; a carrier operating solely in interstate commerce would not be assessed the fee; and a carrier remains free under Michigan law to forgo point-to-point hauls within the State while continuing to use Michigan roads for interstate transportation.

2. Petitioners do not expressly take issue with the validity of MCL § 478.2(1) under *Osborne* or the reasoning of *Sprout*. Rather, they contend that prior decisions of this Court sustaining "flat" fees on intrastate motor carriers

rested on a since-rejected formalist mode of analysis under which "state taxation of 'local' or intrastate activities was wholly unconstrained by the Commerce Clause, while interstate commerce 'itself' was absolutely immune from state taxation." Pet. Br. 32; see *id.* at 31-38. The Court's decision in *Sprout* belies that assertion. The Court in *Sprout* recognized that a State or municipality "may impose, even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways." 277 U.S. at 170 (citations omitted). In holding that the fee imposed by South Bend on interstate carriers could not be sustained on that basis, the Court explained that "[a] flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways." *Ibid.*

Thus, in analyzing the Commerce Clause issue posed by a municipality's imposition of a licensing fee upon a motor carrier's *interstate* operations, the Court in *Sprout* did not rely upon a purported absolute rule that interstate commerce is immune from state and local taxation. Rather, the Court held the challenged fee invalid as applied to such operations because the amount of the assessment was not reasonably calibrated to the individual carrier's use of city highways. That mode of analysis is fully consistent with present-day Commerce Clause jurisprudence, and particularly with this Court's decision in *Scheiner*. See pp. 1-3, *supra*; pp. 22-26 & note 13, *infra*. The *Sprout* Court's recognition that a flat licensing fee *may* be imposed for the right to perform point-to-point carriage within the local jurisdiction, and may be collected from carriers who also undertake interstate operations, therefore cannot be dismissed as the relic of a bygone constitutional era.[6]

B. The Carriage Of Goods Between Points Within The State Of Michigan May Properly Be Treated As A Distinctly Local Activity

As petitioners observe (Br. 9), the fact that MCL § 478.2(1) regulates "intrastate" conduct cannot be dispositive of the Commerce Clause question, since "[v]irtually all interstate activities can be broken down into component parts that take place entirely within one state." The axle tax and marker fee at issue in *Scheiner*, for example, were held to be invalid even though the specific conduct that triggered the assessments (use by commercial motor vehicles of Pennsylvania roads) occurred wholly within the taxing State. See Pet. Br. 33-34. But while the situs of the relevant activity is not by itself decisive, the carriage of goods between two points in Michigan has a much more distinctly local character than does the within-Michigan *segment* of an interstate journey or delivery.

1. In construing the Commerce Clause to impose an independent constitutional check on state taxation, this Court has invoked the Clause's "purpose of preventing a State from retreating into economic isolation or jeopardizing the

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[6] In any event, this Court has pointed out that even where its prior decisions on a particular dormant Commerce Clause issue applied an analysis that has since been disapproved, it does not follow that the prior cases were wrongly decided. See *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 614-617 & n.7 (1981). Thus, the fact that this Court's decisions may no longer regard state taxation of a wholly intrastate activity as entirely beyond Commerce Clause scrutiny does not mean that it is irrelevant for purposes of the tax's validity—*e.g.*, under the *Complete Auto* test described in note 2, *supra*—that the transaction or other event that is the incidence of the tax occurs wholly within a single State. See 453 U.S. at 617, 618-619, 623; *Jefferson Lines*, 514 U.S. at 184, 186-188, 190-191, 196, 199, 200.

welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 179-180 (1995). As applied by Michigan authorities, MCL § 478.2(1) presents no heightened danger of such "economic Balkanization." *Jefferson Lines*, 514 U.S. at 180 (quoting *Wardair Canada Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986)). To the contrary, far from "plac[ing] burdens on the flow of commerce across [Michigan's] borders that commerce wholly within those borders would not bear," *ibid.*, Section 478.2(1) applies *only* to commercial motor vehicles that make point-to-point hauls within the State.[7]

This is not to say that fees imposed for the right to perform intrastate motor carriage will never affect interstate commerce or implicate the concerns that underlie the Court's Commerce Clause jurisprudence. At least in theory, the profitability of a particular interstate delivery could depend on the carrier's ability to supplement the income generated by the interstate shipment itself with additional money earned through intrastate point-to-point hauls during the course of the trip. Cf. J.A. 101 (petitioners' affiant explains that "mixed carriers often top off their interstate loads with intrastate hauls or transport intrastate loads in

[7] A separate provision of Michigan law, MCL § 478.2(2), imposes a $100 annual fee on each motor vehicle that is "registered" (*i.e.*, license-plated) in Michigan and "operating entirely in interstate commerce." See note 3, *supra*. In our amicus brief in *Mid-Con Freight Systems, Inc.* v. *Michigan Public Service Commission*, No. 03-1234, the United States argues that the fee imposed by Section 478.2(2) is preempted by 49 U.S.C. 14504. In any event, MCL § 478.2(2) applies only to Michigan-plated vehicles. Vehicles that are license-plated in other States, as petitioners' trucks apparently are (see Pet. Br. 36 n.16), can make unlimited use of Michigan's roads in interstate commerce without being assessed a fee under MCL § 478.2(1) *or* (2).

between interstate hauls"). A state assessment that deterred carriers from undertaking intrastate hauls therefore could ultimately act as an impediment to some interstate deliveries as well, by causing such deliveries to be unremunerative. That potential effect on interstate commerce, however, is much more indirect and attenuated than when payment of a flat fee is a *legal* prerequisite to use of a State's roads even for *interstate* transit and deliveries. At least in the absence of record evidence concerning the actual impact of MCL § 478.2(1) on interstate carriage, the theoretical possibility of such effects is an insufficient basis for declaring the statute unconstitutional.[8]

2. In applying the "prohibition of multiple taxation" imposed upon the States by the Commerce Clause, see *Jefferson Lines*, 514 U.S. at 184, this Court has identified certain conduct that, even when performed in connection with interstate commerce, is sufficiently discrete and separate from the interstate activity as to be fully taxable by the State in which it occurs. Most notably, the Court has "consistently

[8] As the Michigan Court of Appeals pointed out, "it is a matter of pure speculation" whether interstate motor carriers have actually altered their operations as a result of MCL § 478.2(1). J.A. 101. In the courts below, petitioners "present[ed] no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could occur in the hypothetical." *Ibid.* The Michigan Court of Appeals did not suggest that fees imposed for the right to conduct point-to-point transportation within a State are immune from Commerce Clause scrutiny. Rather, it stated only that, "[o]n the basis of the record before us, we cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways." J.A. 102. Affirmance of the state court's judgment would not preclude a future constitutional challenge, based on proof of actual and substantial impairment of interstate commerce, to similar (or substantially larger) fees on intrastate carriage, especially fees not subject to any safety-valve or waiver for one-time loads along the lines allowed by Michigan, see note 1, *supra*.

approved taxation of sales without any division of the tax base among different states, and ha[s] instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future." *Id.* at 186. That rule reflects the Court's determination that "[a] sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale." *Ibid.*; see *id.* at 188 ("[T]he taxable event of the consummated sale of goods has been found to be properly treated as unique."). The sales price is fully subject to state taxation "even when the parties to a sales contract specifically contemplated interstate movement of the goods either before, or after, the transfer of ownership." *Id.* at 187.

The transportation of goods wholly within Michigan should similarly be regarded as a discrete event unique to that State, even when it is performed in conjunction with an interstate shipment (as when carriers "top off their interstate loads with intrastate hauls or transport intrastate loads in between interstate hauls," J.A. 101). Such an intrastate delivery is a distinct and independently significant commercial transaction having its locus wholly within Michigan. The fact that a particular intrastate cargo is carried on the same truck that transports *other* goods in interstate commerce is likely to be irrelevant to the shipper, if the shipper is aware of the fact at all. An intrastate shipment is for these purposes quite different from the use of Michigan's roads during one *segment* of an interstate delivery, since that nexus to the interstate transaction will (by definition) be shared with at least one other State.

3. Congress's delineation of the scope of federal regulatory jurisdiction over commercial motor carriage confirms the distinctly local character of point-to-point hauls within a single State. Under 49 U.S.C. 13501, the Secretary of Transportation and the Surface Transportation Board have juris-

diction over transportation of goods or passengers by motor carrier "between a place in * * * a State and a place in another State," or "between a place in * * * a State and another place in the same State through another State." 49 U.S.C. 13501(1)(A) and (B). The fact that the Secretary and the Board lack jurisdiction over purely intrastate motor carriage, which was traditionally subject to state regulation, see, *e.g.*, Act of Aug. 9, 1935, ch. 498, § 202(c), 49 Stat. 543 (49 U.S.C. 302(b) (1976)), reinforces the conclusion that Michigan may permissibly treat the oversight of such activities within its borders as a matter of particular state concern. Cf. *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 304-305, 309-310 (1997) (in holding that Ohio's differential treatment of natural gas sales by public utilities and independent marketers did not violate the Commerce Clause, Court relied in part on Congress's longstanding recognition of state regulatory authority to create and preserve local utility monopolies).

Prior to 1995, federal law left the States free to engage in comprehensive economic regulation of intrastate carriage of goods by motor carriers, and many States did so. See H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 86 (1994). Under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, however, States and localities now are generally barred from enacting or enforcing laws "related to a price, route, or service of any motor carrier." 49 U.S.C. 14501(c)(1); see *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 429-430 (2002). State *economic* regulation of commercial motor carriage is thus preempted by statute, even insofar as such regulation pertains to point-to-point hauls within a single State. States remain free, however, to regulate such matters as safety and insurance with respect to intrastate operations. See 49 U.S.C. 14501(c)(2)(A). In light of the substantial role that States continue to possess in this area, and the absence of federal

regulatory jurisdiction over carriage of goods or passengers wholly within a single State, treatment of such carriage as a separate sphere of legitimate state concern under the Commerce Clause is consistent with the applicable statutory framework enacted by Congress in the exercise of its power over interstate commerce.

C. Acceptance Of Petitioners' Constitutional Argument Would Cast Doubt Upon Numerous Licensing Fees Imposed By States And Localities As A Condition Of Engaging In Particular Occupations Within The Relevant Jurisdiction

1. Petitioners' constitutional argument rests on the closely related propositions that (a) MCL § 478.2(1) is discriminatory because interstate trucks are charged the same fee as intrastate vehicles but are likely to make fewer point-to-point hauls in Michigan during the course of the year, and (b) if other States imposed similar charges, a truck used to make point-to-point hauls within many States during the course of a year would be subject to substantial cumulative fees. See, *e.g.*, Pet. Br. 13. Very similar arguments could be made, however, with respect to a wide range of "flat" fees charged for engaging in particular occupations within the charging State or locality. A bar admission fee, for example, confers a privilege that is more valuable to a lawyer who practices exclusively within one State than to an attorney who divides his time between several States.[9]

Examination of the D.C. Code reveals many analogous examples. See, *e.g.*, D.C. Code Ann. § 47-2808(a) (2001) ("Auctioneers shall pay a license fee of $222 per annum."); *id.* § 47-2827 (schedule of licensing fees for purveyors of different varieties of food); *id.* § 47-2834(a) (varying licensing fees for persons who sell food or other goods from locations on the public streets or from door to door, or who engage in street photography or shining shoes); *id.* § 47-2836(a) ($28 annual licensing fee for any person who acts, for hire, as a guide or escort); § 47-2839(a) ($158 annual licensing fee for private detectives). Under petitioners' theory, each of those fees is at least arguably unconstitutional as applied to persons who wish to engage in a covered occupation in more than one State during the course of the year. Such persons could truthfully assert that (a) they are required to pay the same amount as is a full-time D.C. operator for a privilege that is inherently less valuable to the itinerant, and (b) the imposition of similar fees by other States and/or municipalities would create an economic disincentive to interstate travel for the purpose of performing the services for which a license is required.

Petitioners might plausibly seek to distinguish such assessments on the ground that flat fees will likely have a greater *practical* impact on an inherently mobile enterprise like trucking than on, *e.g.*, private detectives, many of whom will operate out of fixed locations regardless of a particular State's licensing rules. It is scarcely farfetched, however, to suppose that an auctioneer, or a guide, or a sidewalk vendor, or a street photographer would move from State to State during the course of a year to take advantage of seasonal opportunities. In any event, to the extent that the disposition of petitioners' constitutional challenge turns on the likely practical effects of MCL § 478.2(1) (and hypothetical similar provisions enacted by other States), rather than on a purported structural objection to flat fees generally,

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[9] The disparate impact of "flat" bar admission fees is often ameliorated by the opportunity to obtain leave to appear pro hac vice, with the fee charged for such appearances set at a fraction of the standard yearly bar dues. Michigan provides a comparable opportunity to truckers by offering a 72-hour operating permit, for a fee of $10, as an alternative to payment of the full $100 annual fee. MCL § 478.2(3); see note 1, *supra*.

petitioners' failure to introduce evidence of those effects is a serious weakness in their argument. See note 8, *supra*.[10]

2. In its so-called "peddler" cases, this Court has repeatedly sustained, against Commerce Clause challenge, nondiscriminatory state licensing requirements (including flat fees) imposed as a condition of engaging in local business, even when the licensees were also engaged in interstate commerce. See, *e.g.*, *Dunbar-Stanley Studios, Inc.* v. *Alabama*, 393 U.S. 537, 539-542 (1969); *Eli Lilly & Co.* v. *Sav-On-Drugs, Inc.*, 366 U.S. 276, 278-284 (1961); *Caskey Baking Co.* v. *Virginia*, 313 U.S. 117, 119-121 (1941); *Wagner* v. *City of Covington*, 251 U.S. 95, 100-104 (1919). The Court in *Wagner* explained:

> We have, then, a state tax upon the business of an itinerant vendor of goods as carried on within the state, a tax applicable alike to all such dealers, irrespective of where their goods are manufactured, and without discrimination against goods manufactured in other States. It is settled by repeated decisions of this court that a license regulation or tax of this nature, imposed by a State

[10] The logic of petitioners' argument might also suggest that States and localities have a constitutional obligation to prorate an applicable licensing fee when a new resident seeks to engage in the relevant occupation for only a portion of the period covered by the license. Under the Privileges and Immunities Clause of the Fourteenth Amendment, a State is ordinarily prohibited from discriminating among its citizens based on length of residence within the State. See, *e.g.*, *Saenz* v. *Roe*, 526 U.S. 489, 502-504 (1999). A person who relocates in a particular State on September 1, however, and is required to pay a fixed annual fee for the right to engage in a particular trade or business during the calendar year, can be expected to derive less benefit from the fee than one who resides in the State throughout the year. If that sort of foreseeable practical disparity is regarded as a form of illicit discrimination in the Commerce Clause setting, there is no evident reason that a different rule should apply under the Privileges and Immunities Clause.

> with respect to the making of such sales of goods within its borders, is not to be deemed a regulation of or direct burden upon interstate commerce, although enforced impartially with respect to goods manufactured without as well as within the State, and does not conflict with the 'commerce clause.'

Id. at 102.

In upholding those licensing schemes, the Court expressly distinguished state regulation of "peddlers" from the "drummer" cases in which state restrictions on solicitation, as applied to solicitation of interstate business, had been declared unconstitutional. See, *e.g.*, *Wagner*, 251 U.S. at 103 ("The distinction between state regulation of peddlers and the attempt to impose like regulations upon drummers who solicit sales of goods that are to be thereafter transported in interstate commerce, has always been recognized."). The Court in *Wagner* explained that "in all the 'drummer cases' the fact has appeared that there was no selling from a stock of goods carried for the purpose, but only a solicitation of sales, with or without the exhibition of samples; the goods sold to be thereafter transported from without the State." *Ibid.*[11] The fee at issue in this case, which is triggered by

[11] *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946), on which petitioners heavily rely (*e.g.*, Br. 17, 19, 30, 37-38), was a "drummer" case involving local solicitation on behalf of an out-of-state company. See 327 U.S. at 419 n.3, 420; see also *West Point Wholesale Grocery Co.* v. *City of Opelika*, 354 U.S. 390, 391 (1957) (summarizing *Nippert* as holding that "a municipality may not impose a flat-sum privilege tax on an interstate enterprise whose only contact with the municipality is the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce"). In *Eli Lilly*, decided after *Nippert*, the Court reaffirmed that, "[u]nder the authority of the so-called 'drummer' cases, * * * Lilly is free to send salesmen into New Jersey to promote [its] interstate trade without interference from regulations imposed by the State. On the other hand, it is equally well settled that if

point-to-point carriage within the State of Michigan, is plainly more analogous to the state regulations involved in the "peddler" cases than to the solicitation restrictions that were struck down in the "drummer" cases.

D. Because The Fee At Issue In This Case Is Imposed Only On Trucks That Conduct Point-To-Point Hauls Within The State Of Michigan, This Court's Decision In *Scheiner* Is Not Controlling

The principal thrust of petitioners' argument is that the fee imposed by MCL § 478.2(1) is constitutionally indistinguishable from the assessments struck down in *Scheiner* (see pp. 1-3, *supra*), and that the ruling in that case effectively supersedes prior decisions of this Court upholding flat fees imposed by States and localities for the right to conduct intrastate carriage. That claim lacks merit.

1. Under the Pennsylvania laws at issue in *Scheiner*, motor vehicles within specified categories were required to pay the marker fee and/or the axle tax in order to make *any* use of the State's roads. See 483 U.S. at 273-274. Payment of the fees was thus a *legal prerequisite* to the conduct within the State of *interstate commerce* using the covered motor vehicles. See *id.* at 284 (noting that the "inevitable effect" of the challenged flat fees was "to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania"). The fees were imposed, moreover, even upon trucks that used Pennsylvania's roads only in the

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Lilly is engaged in intrastate as well as interstate aspects of the New Jersey drug business, the State can require it to get a certificate of authority to do business." 366 U.S. at 278-279; see *id.* at 287-288 (Harlan, J., concurring) (rejecting the contention that the decision in *Eli Lilly* was contrary to the Court's "drummer" precedents, and explaining that the Court had "not been referred to any case in which an interstate seller has been granted an immunity from a state-license requirement where the seller has promoted or participated in transactions between a local vendor and a local purchaser involving goods already within the State").

course of delivering cargo between points in other States. Under Michigan's statutory regime, by contrast, motor vehicles can make extensive use of the State's highways in interstate commerce, either to transport goods between points inside and outside Michigan, or to pass through Michigan en route between other States, without being subject to MCL § 478.2(1)'s $100 annual fee.[12]

The Court in *Scheiner* framed the question before it as whether "the methods by which [Pennsylvania's] flat taxes are assessed discriminate against some participants in interstate commerce in a way that contradicts the central purpose of the Commerce Clause." 483 U.S. at 282. The Court "f[ou]nd dispositive those of [its] precedents which make it clear that the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States." *Ibid.* The Court thus focused on the potential impact of the challenged fees on *interstate* operations. In the instant case, by contrast, any impact on interstate carriage is both attenuated and (so far as the evidentiary record is concerned) speculative. See pp. 14-15 & note 8, *supra*.

Furthermore, the incidence of the taxes and fees in *Scheiner* was on the use of the State's highways, and the Court therefore concluded that a mileage-based fee would fairly apportion those taxes and fees to carriers in the course of their interstate travels. In this case, by contrast, the fee

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[12] If interpreted in accordance with its literal terms—*i.e.*, as applicable to "each self-propelled motor vehicle operated by or on behalf of" a licensed motor carrier within the State—MCL § 478.2(1) would be constitutionally indistinguishable from the assessments struck down in *Scheiner*. Like the Florida Supreme Court in *Osborne*, however, Michigan authorities have applied a saving construction of the statute as covering only commercial motor vehicles used for intrastate carriage. Compare *Osborne*, 164 U.S. at 654; p. 10, *supra*.

is assessed for the privilege of engaging in purely intrastate transactions and services, not for the use of Michigan's highways, see *Jefferson Lines*, 514 U.S. at 198-199, and the fee is not assessed for the portion of a vehicle's operations that are in interstate commerce. There accordingly is no basis in the Commerce Clause for requiring that the fee be mileage-based. For similar reasons, because the fee is assessed only for engaging in wholly intrastate operations, nothing in *Scheiner* suggests that the fee must be apportioned according to the number of intrastate hauls that a particular vehicle makes simply because the owners of some interstate vehicles may choose to participate as well in that wholly intrastate activity.

2. The Court in *Scheiner* relied substantially on record evidence indicating that "the cost per mile of each of the flat taxes is approximately five times as high for out-of-state vehicles as for local vehicles." 483 U.S. at 276. Petitioners contend that MCL § 478.2(1) is likely to have a comparable discriminatory impact (though their argument focuses on the asserted potential for discrimination between intrastate and interstate trucks, rather than between in-state and out-of-state vehicles, see note 4, *supra*). *Scheiner* does not suggest that such a disparate impact, even if proved, would constitute a satisfactory basis for departing from prior decisions (see pp. 9-11, 20-21, *supra*) that have upheld flat fees charged for permission to engage in intrastate carriage and other local businesses.[13]

[13] In support of its conclusion in *Scheiner* that Pennsylvania's flat fees were discriminatory, the Court quoted with approval its prior statement in *Sprout* (see pp. 10-13, *supra*) that "[a] flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways." *Scheiner*, 483 U.S. at 286 n.21 (quoting *Sprout*, 277 U.S. at 170). On the page of the opinion immediately following the

In any event, to the extent that any such disparity would be relevant to the constitutional analysis, it is far from clear that Section 478.2(1) imposes disproportionate burdens upon interstate carriers, relative to alternative taxing schemes that would be unobjectionable under *Scheiner*. In 1994, the State of Michigan "collected approximately $2,905,000 in intrastate vehicle decal fees" pursuant to MCL § 478.2(1). J.A. 24. Consistent with the Commerce Clause, the State could have collected the same total sum through a mileage-based fee, see *Scheiner*, 483 U.S. at 283, 297, under which interstate vehicles as a class (without regard to whether they undertook any intrastate hauls) would have paid a percentage of the $2,905,000 equal to the percentage of total commercial motor vehicle miles traveled by interstate trucks. It is not at all clear whether interstate carriers as a whole pay a greater proportion of the $2,905,000 under Section 478.2(1) than they would pay under the alternative mileage-based regime.

It is likely true (though the fact has not been established with the sort of record evidence that was before the Court in *Scheiner*, see 483 U.S. at 276 n.9) that, *within the class of commercial motor vehicles that actually conduct point-to-point hauls within Michigan and are therefore assessed the $100 fee*, the average interstate vehicle will derive less benefit from the fee imposed by MCL § 478.2(1) than does the average truck that operates wholly within Michigan. But vehicles that use Michigan's roads for interstate deliveries *without* making point-to-point hauls within the State will escape the fee entirely and thus will contribute less money towards the state functions that the fee supports than they would pay

language quoted in *Scheiner*, however, the Court in *Sprout* expressly recognized the authority of a State or locality to require payment of a flat "occupation tax" as a condition of authority to engage in purely intrastate carriage. 277 U.S. at 171; see p. 11, *supra*.

under a mileage-based system. It is therefore inaccurate to say that MCL § 478.2(1) disproportionately affects interstate vehicles as a class. Rather, Section 478.2(1) favors one subset of interstate vehicles (those that use Michigan roads exclusively in interstate commerce) while probably disfavoring another (those that engage in some point-to-point hauls in Michigan). Absent any record evidence or other reliable information indicating the relative proportions of those two classes of trucks, petitioners have offered no sound basis for concluding that Section 478.2(1) has an adverse aggregate impact upon interstate vehicles.

A similar analysis applies to petitioners' claim that MCL § 478.2(1) fails this Court's "internal consistency" test. If other States imposed similar fees, it is unclear whether interstate vehicles generally, or vehicles operating in numerous States in particular, would as a class contribute larger amounts to the States' regulatory programs or highway systems than they would pay under a mileage-based regime. To the extent that such intrastate flat fees served to defray costs that would otherwise be recouped through mileage-based charges, a vehicle making exclusively interstate deliveries would benefit from such a system, no matter how large the number of States through which it traveled in a given year. By contrast, a vehicle that combined interstate travel with point-to-point hauls in each of several States might well pay a disproportionate (in comparison to mileage traveled) share of total assessments. Neither record evidence nor abstract logic makes clear whether the overall effect of such a system would be to increase or to reduce existing financial disincentives to interstate travel.

3. Petitioners also suggest that, whatever impact MCL § 478.2(1) may have on interstate operators in the aggregate, the prospect that Section 478.2(1) will deter *some* individual carriers from undertaking point-to-point hauls within Michi-

gan is a sufficient basis for declaring the law unconstitutional. Absent evident protectionist intent, facial discrimination against interstate (or out-of-state) operators, or an established likelihood of systemic burdens on interstate commerce, this Court's decisions do not support the application of so demanding a constitutional standard for determining the validity of a state tax on a wholly *intrastate* transaction. Rather, the fee imposed by MCL § 478.2(1) should be reviewed under the standard set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970): "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Section 478.2(1) is constitutional under that standard because it is facially nondiscriminatory; the regulated conduct has a distinctly local character; the effects on interstate deliveries are indirect and unproven; and petitioners have failed to prove that the fee has a disproportionate impact on interstate vehicles and/or operators as a class.

Petitioners' apparent constitutional objective—*i.e.*, a regulatory regime in which state boundaries have *no* economic relevance to a motor carrier's choice of routes—is impossible to achieve without much greater standardization of state fees than Congress has yet been willing to require. Cf. *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 279-280 (1978) (explaining that "[t]he prevention of duplicative [state] taxation * * * would require national uniform rules for the division of income," and recognizing that "the adoption of a uniform code would undeniably advance the policies that underlie the Commerce Clause," but concluding that the authority to promulgate any such uniform rules is properly entrusted to Congress rather than to the Court). To take one example: under current precedent, assessments based on mileage traveled within a State appear to be largely insulated from

Commerce Clause attack. See *Scheiner*, 483 U.S. at 283 & n.15. But so long as some States charge higher per-mile fees than others, that disparity will (other things being equal) affect the relative profitability of doing business in different States. The infeasibility of altogether eliminating such incentives reinforces the conclusion that there should be play in the joints, and that, at least in the absence of record evidence concerning the likely practical impact of MCL § 478.2(1) on interstate carriage, the theoretical possibility that some such effect will occur is not a sufficient basis for declaring the law invalid.

CONCLUSION

The judgment of the Michigan Court of Appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC. and USF HOLLAND, INC.

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *ET AL.*

Respondents.

On Writ of Certiorari to the Court of Appeals of Michigan

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy and in every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus* briefs in cases involving issues of national concern to American business. The Chamber has participated as *amicus curiae* in several hundred cases before this Court, and filed an *amicus* brief in this case urging the Court to grant the petition for a writ of certiorari.[1]

The Chamber and its members have a strong interest in this case because the decision of the Michigan Court of Appeals is fundamentally inconsistent with the core constitutional principle of free trade among the States. The federal Constitution was drafted to replace the Articles of Confederation largely to advance that principle, and it is critical to the conduct of American business that the United States remain a free trade zone. As this Court has emphasized, the Commerce Clause "was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. Seelig*, 294 U.S. 511, 523 (1935).

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[1] Pursuant to Sup. Ct. R. 37.6, the *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief and their written consents accompany this brief.

Facially discriminatory tax burdens – those imposed on interstate but not intrastate commerce – are, of course, unconstitutional. But this Court has recognized that facially neutral flat taxes imposing "the full brunt, or . . . a major portion, of their burden" on out-of-state entities are also unconstitutional. *Am. Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 284 (1987). The Court has therefore insisted on "internal consistency" – "a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Id.* at 284 (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)).

The court below characterized the Michigan levy at issue as a "regulatory fee" rather than a "tax," and refused to apply the "internal consistency" standard for that reason. But constitutional principles should not turn on formalistic matters of characterization – whether denominated a "fee" or a "tax," a state levy may burden interstate commerce just the same. Because the lower court decision circumvents this Court's Commerce Clause jurisprudence and sets forth a roadmap for other courts and state legislatures to do the same – raising the specter of balkanization not only in the trucking industry, but throughout the national economy – the Chamber urges reversal.

STATEMENT OF THE CASE

This case involves a $100 charge assessed by Michigan on motor carriers transporting property within the State. *See* Michigan Compiled Laws § 478.2(1). The Michigan charge is functionally equivalent to the $36 per axle tax invalidated by this Court in *Scheiner*. As here, the *Scheiner* axle tax was facially neutral, applying both to vehicles registered in Pennsylvania and to vehicles registered in other states.

In *Scheiner*, this Court struck down the axle tax, applying the "internal consistency" standard developed in previous Commerce Clause cases from the requirements that state levies be "fairly apportioned" and "not discriminate against interstate commerce." 483 U.S. at 277. The Court reasoned that the axle tax was not "internally consistent" because "[i]f each state imposed" such a tax, "there is no conceivable doubt that commerce among the States would be deterred." *Id.* at 284. That was because, for example, a five-axle truck operating only in Pennsylvania would have to pay only one $180 fee, while a truck operating in 10 states would incur $1,800 in liability if other states were to enact the same tax. The Court accordingly concluded that "the axle tax has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the States that enacted the measure rather than 'among the several States.'" *Id.* at 286-87.[2]

In this case, the Michigan appellate court declined to apply the "internal consistency" test at all. Applying state law principles, the lower court found that the $100 charge

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[2] The *Scheiner* Court also invalidated a $25 "marker fee" applicable to out-of-state vehicles, which in-state vehicles were "deemed" to pay through their Pennsylvania registration fee. *See* 483 U.S. at 281-86.

was not a tax, but a "regulatory fee," because "it is a fee imposed for the administration of the MCA [the Michigan Carrier Act], particularly covering costs of enforcing safety regulations." JA 83, 91-96. The lower court held that conclusion dispositive of the federal Commerce Clause issue. In a terse footnote, the court ruled that the internal consistency test did not apply because it "is used to analyze the constitutionality of state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, . . . not regulatory statutes." JA 99 n.15. The court proceeded to apply the more lenient "balancing" test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which pertains to regulations rather than assessments. JA 101-102. The court concluded: "[W]e cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways." *Id.*

SUMMARY OF ARGUMENT

This case presents an issue of great importance to American business because the decision below unsettles a central precept of dormant Commerce Clause jurisprudence, and in a way that cannot be confined to the circumstances of this case. It is black-letter law that state taxes must be "internally consistent," such that "'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Scheiner*, 483 U.S. at 284 (quoting *Armco*, 467 U.S. at 644)). It is also abundantly clear that Michigan's $100 charge for engaging in intrastate motor carriage flunks the internal consistency test and discourages the free flow of commerce among the states.

The lower court avoided reaching that conclusion only by holding the charge at issue to be a "regulatory fee" rather

than a "tax." That distinction has no place in Commerce Clause jurisprudence: the burden on interstate commerce does not depend on whether an assessment is labeled a "fee" or a "tax," and there is accordingly no sound basis for applying the internal consistency test only to the latter. If other courts and state legislatures were to adopt the Michigan court's approach, it would lead to nullification of several of this Court's recent dormant Commerce Clause decisions involving motor carriers, as well as decisions dating back many years involving other forms of interstate commerce. The decision below thus threatens not only the trucking industry, but other participants in interstate commerce as well.

This case cannot reasonably be distinguished from *Scheiner* on the ground that the Michigan fee applies only if a trucker *chooses* to pick up and deliver a load in Michigan. This Court's modern jurisprudence simply leaves no room for justifying a discriminatory tax on the basis that it can be avoided by choosing not to do business in a State. Moreover, the Michigan fee has a protectionist component as well as a discriminatory component – because it discourages interstate truckers from competing with in-State trucks for loads within the State – and it is thus even more troubling than the axle tax this Court invalidated in *Scheiner*.

ARGUMENT

I. *SCHEINER* PLAINLY DEMONSTRATES WHY THE INTERNAL CONSISTENCY TEST SHOULD APPLY TO "REGULATORY FEES" AS WELL AS TO "TAXES."

The Michigan court's decision injects an irrelevant and potentially dangerous distinction between "taxes" and

"regulatory fees" into the presently straightforward application of the "internal consistency" test. Because the $100 assessment confers on a motor carrier only the narrow "right to operate its trucks in Michigan" and is "credited" directly to the Michigan Public Service Commission to be spent enforcing the State's motor carrier regulations, the court concluded that "the primary purpose of [the] fee is regulatory in nature." JA 91, 93.[3] The Chamber has no quarrel with that conclusion as a matter of Michigan law and recognizes that the fee/tax distinction is often relevant to assessing uniformity and equality under state constitutional provisions.[4]

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[3] The court below reached the fee/tax question in the course of dismissing plaintiffs' challenge to the $100 fee under the state constitution's Uniform Taxation Clause. JA 91-96 & n.14.

[4] *See* Jerome R. Hellerstein & Walter Hellerstein, State Taxation § 2.01 & §2.01[1] at 2-2 – 2-4 (3d ed. 1999 & Supp. No. 2 2004) ("Almost all the state constitutions contain provisions requiring taxes to be uniform or equal or both. . . . Because state uniformity and equality provisions generally apply only to taxes, the question often arises whether a particular exaction constitutes a tax that is subject to the constitutional restriction, or a fee or charge that need not be uniform or equal. . . . The factors courts use to distinguish fees from taxes include (1) whether the payment was voluntary (fee) or involuntary (tax); (2) whether the payment was for a specific governmental benefit (fee) or for general governmental purposes (tax); (3) whether the payment was made into a segregated fund (fee) or paid into the general treasury (tax); and (4) whether the payment was imposed by a regulatory agency upon those subject to regulation (fee) or to defray general governmental expenditures (tax)."); *see also San Juan Cellular Telephone Co. v. Public Service Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992) (Breyer, C.J.) (collecting federal cases in which statutory language or purpose made the tax/fee distinction determinative).

The Chamber submits, however, that this state law distinction has never been relevant under the Commerce Clause, and for good reason. To begin with, *Scheiner*'s bare facts prove that a state levy is not immunized from the internal consistency test just because it exhibits some characteristics of a "regulatory fee." Indeed, the *Scheiner* levy was as much a "regulatory fee" as the levy here: It conferred only the narrow right to operate a truck in Pennsylvania and payments of the levy were "'credited to the Motor License fund and expended exclusively for road-related purposes.'" *Am. Trucking Ass'n. v. Scheiner*, 509 A.2d 838, 840 (Pa. 1986) (quoting Joint Stipulation of Facts). Yet the *Scheiner* Court found the internal consistency test applicable and held "the unapportioned flat tax[]" unconstitutional. 483 U.S. at 284. In fact, the administrative earmarking of the *Scheiner* tax for regulatory expenses was not even *mentioned* in the eight pages of this Court's decision that "describe[d] the challenged taxes in some detail." *Id.* at 269. The clear import of that omission is that the factors distinguishing fees from taxes under state law have nothing to do with the concerns of the Commerce Clause.

Other aspects of the *Scheiner* Court's reasoning underscore the irrelevance of the tax/fee distinction. In particular, the decision explains that even facially neutral "unapportioned flat taxes" on interstate motor carriers "penalize some travel within the free trade area" protected by the Commerce Clause, 483 U.S. at 284, by imposing a greater per-mile burden on out-of-state operators than on in-state operators. *Id.* at 291. The internal consistency test highlights the grave danger to interstate commerce these taxes pose – if every state were free to impose such a tax and every state did so, travel among the states would be discouraged. And even if only *one* state were to impose such

a tax, the *Scheiner* court explained, the "inevitable effect" would still be "to threaten the free movement of commerce by placing a financial barrier around" that state. *Id.* at 284.

The crucial implication of *Scheiner*'s reasoning for present purposes is that whether "commerce among the States w[ill] be deterred" depends only upon whether motor carriers must pay a flat sum – however labeled. 483 U.S. at 284. An out-of-state motor carrier that must pay that charge will be no less deterred if revenue is earmarked for a regulatory fund or because the obligation to pay attaches to other businesses besides motor carriage. As this Court has noted in a closely related context, "a focus on . . . formalism merely obscures the question whether the tax produces a forbidden *effect*." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977) (emphasis added) (rejecting the archaic distinction between impermissible taxes upon the privilege of doing business and permissible franchise taxes); *see also Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 181 (1995) ("pragmatism . . . has . . . become our aspiration in this quarter of the law").[5] The only constitutionally relevant inquiry is whether the "tax" or "fee" unduly interferes with free trade – and the internal consistency test provides the answer under either rubric.

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[5] *Complete Auto* also synthesized existing precedent to formulate the modern four-part analytic framework: the Court "sustain[s] a [state] tax against Commerce Clause challenge when [1] the tax is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Id.* at 279. The internal consistency standard has developed from the second and third prongs of this test. *See Jefferson Lines*, 514 U.S. at 185; *Scheiner*, 483 U.S. at 277; *Armco*, 467 U.S. at 644.

Academic commentary reinforces the point that it is the practical burden on commerce – and not the label "tax" or "fee" – that implicates core Commerce Clause concerns. "From an economic standpoint," "fees[] and taxes are analytically the same." Jerry Hausman and Howard Shelanski, *Economic Welfare And Telecommunications Regulation: The E-Rate Policy For Universal-Service Subsidies*, 16 Yale J. Reg. 19, 22 n. 59 (1999). Certainly that is true for Commerce Clause purposes under the internal consistency test. As Professor Hellerstein has noted, "the evils that the 'internal consistency' test was designed to combat are the same regardless of whether the unapportioned flat levy is an exercise of the tax power or the regulatory power," and therefore no "sound policy basis . . . distinguish[es] the 'fee' from the 'tax' cases." Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 157 (1988).

Nor is it likely that the functional equivalence between fees and taxes would be lost on the states. In practice, the line between "regulatory fees" and "taxes" is far from clear, and has been criticized as analytically unsatisfying. *See generally* Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 Gonz. L. Rev. 335 (2003); Major Cotell and Lieutenant Colonel Jaynes, *Regulatory Fees . . . Or Taxes: Sorting Out The Difference*, 1999 Army Law. 32. State courts inclined to uphold state money-raising measures (whether "taxes" or "fees") could simply adjust the line between those categories to expand the "fee" category and correspondingly contract the "tax" category. Indeed, the court below addressed the question as a matter of state law – an approach that would, if generally applied, maximize state courts' ability to determine outcomes under the federal Commerce Clause by re-categorizing levies as "fees."

Similarly, state legislatures and agencies could also shift "taxes" to "fees" merely by (1) limiting their application to specific kinds of businesses subject to regulation by a particular agency and (2) administratively earmarking the proceeds to fund specific regulatory expenses. Enforcement of the Constitution's guarantee of a free trade zone among the States should not be left to turn on this uncertain and easily manipulated distinction.

II. THE TAX/FEE DISTINCTION, IF INDULGED, WOULD AFFECT FAR MORE THAN JUST THE RIGHTS OF MOTOR CARRIERS.

The decision below would not only nullify *Scheiner* and related decisions of this Court involving motor carriers, but would also eviscerate decades of precedent regarding other areas of interstate commerce. For example, in a series of decisions between 1887 and 1946, this Court held that states are not permitted to impose flat taxes on "drummers" – traveling sales merchants who displayed their goods and took orders. *See Nippert v. Richmond*, 327 U.S. 416 (1946); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940); *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887). In each case, the taxing authority defended the levy on the ground that it was facially neutral. *Nippert*, 327 U.S. at 431; *Best & Co.*, 311 U.S. at 456; *Robbins*, 120 U.S. at 497. In each case, this Court rejected the argument, observing that in-state businesses generally do not need drummers and may instead rely on their ordinary retail operations. Because of limited demand for drummers among in-state businesses, the facially neutral tax would inevitably work to the disadvantage of out-of-state businesses. As the *Scheiner* Court observed, the invalidity of these taxes is even clearer under the modern internal consistency test. If each taxing jurisdiction assessed

a flat levy for the privilege of drumming, "there is no conceivable doubt that commerce among the States would be deterred." 483 U.S. at 284 & n.16.

The most recent of the Court's drummer decisions emphasized that their reasoning applies to any service or line of business utilized primarily by out-of-state entities: "The drummer is a figure representative of a by-gone day. But his modern prototype persists under more euphonious appellations. So endure the basic reasons which brought about his protection from the kind of local favoritism the facts of this case typify." *Nippert*, 327 U.S. at 435 (cited by *Scheiner*, 483 U.S. at 281 n.12). Even today, the drummer cases – now incorporated into the familiar four-part *Complete Auto* test, *see supra* n.5 – protect modern salespeople against facially neutral but nevertheless discriminatory taxes. *See, e.g., Homier Distributing Co. v. City of Albany*, 90 N.Y.2d 153 (N.Y. 1997) (citing *Nippert* as well as the *Complete Auto* test in finding unconstitutional a facially neutral state tax on "transient" retailers who operate at temporary business sites).

The lower court's analysis according dispositive weight to the fee/tax distinction would eliminate the important practical protections afforded by the drummer cases and their modern progeny. States would be free to charge traveling salespeople unapportioned flat "regulatory fees," or perhaps even to charge such fees for the privilege of distributing mail-order catalogs within a state. States could simply earmark the proceeds of such levies for regulatory programs (curbing abusive sales tactics in the case of salespeople, for example, or litter in the case of catalogs), and defend them as "fees" rather than "taxes." The lenient *Pike Church* balancing test might then apply to this facially neutral "regulation." The demand for such protectionist measures would likely be enormous: In the pre-*Robbins* era it is estimated that over 800 municipal ordinances directed at

drummers were enacted for the purpose of protecting local merchants. Hellerstein & Hellerstein, State Taxation ¶ 4.13[2][a][i] 4-74 & n.317. And the consequent effect on interstate commerce would surely be crippling.

A more recent line of cases prohibiting states from offering discriminatory multiple tax exemptions is also jeopardized by the artificial fee/tax distinction endorsed by the court below. In *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), for example, the Court invalidated a Washington State manufacturing tax that exempted taxpayers already subject to Washington's wholesaling tax. Applying the internal consistency test, the Court reasoned that if every state followed Washington's lead, manufacturers would be induced to wholesale their goods in the state of manufacture – to the detriment of free-flowing interstate commerce. In-state manufacturers selling at wholesale would pay only one tax (the wholesale tax) – they would be exempt under the multiple tax exemption from paying their state's manufacturing tax. But manufacturers selling at wholesale out of state would have to pay two taxes (their own state's manufacturing tax and the other state's wholesaling tax). The internal consistency test is a useful tool for revealing the hidden discriminatory effect of such tax schemes.

If the tax/fee distinction proposed by the court below were to be indulged, however, the states could simply restyle *Tyler Pipe*-style manufacturing and wholesale tax regimes favoring in-state companies as "regulatory fees" assessed to defray the costs of enforcing, for instance, state labor, product safety, and environmental regulations. The states could reasonably argue that enforcing manufacturing regulations against a business is less expensive if the state is already enforcing wholesaling regulations against that same entity (*e.g.*, the state would only have to inspect the

company's books once). The pressure on businesses to locate their manufacturing and wholesaling operations in a single state would be just as strong as in *Tyler Pipe* (or *Armco*) but, under the lower court's erroneous view, the discriminatory effects of the scheme would receive only lenient *Pike Church* scrutiny. As with the drumming cases, the lower court decision would re-open long-settled issues that potentially affect not merely trucking, but a wide variety of industries.

In sum, the early drummer decisions, the modern *Complete Auto* test that synthesized then-existing cases, the internal consistency standard, and the body of modern cases applying these complex rules were all designed to take account of the unique problems of discrimination (both intentional and inadvertent) that arise when multiple taxing authorities assert simultaneous jurisdiction over multi-state and multi-national businesses. In particular, this Court has established the internal consistency standard to reveal the discriminatory effect of the flat taxes in *Scheiner* and the multiple tax exemptions in *Armco* and *Tyler Pipe*, as well as to demonstrate the *non*-discriminatory effect of the sales taxes on interstate traffic addressed in *Goldberg v. Sweet*, 488 U.S. 252 (1989) (upholding sales tax on certain interstate telephone calls made within the state) and *Jefferson Lines*, 514 U.S. 175 (upholding sales tax on the value of interstate bus tickets sold within the state). *See generally* Hellerstein, 87 Mich. L. Rev. 138 (arguing that the internal consistency test serves to prevent multiple jurisdictions from imposing multiple taxes on the same activity). "Regulatory fees" – because they are analytically identical to taxes – raise these same questions under a different label: unapportioned flat fees, multiple fee exemptions, ad valorem fees involving interstate activity, and so forth, can have the same effects as "taxes." Thus, even were this a case of first impression and

Scheiner less plainly dispositive, it would still be necessary to find "regulatory fees" subject to the branch of Commerce Clause doctrine that evolved to deal with taxes rather than the branch that evolved to deal with regulations.

Finally, the Chamber does not intend to suggest that all state assessments fail the internal consistency test. For example, as this Court explained in *Scheiner*, fuel consumption taxes are directly apportioned to the miles traveled in a particular state, and therefore permissible under the Commerce Clause. *See* 483 U.S. at 283. Other sorts of user fees that would not burden interstate commerce even if applied by all States – such as the $1 charge for airline passengers at issue in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), which was a reasonable approximation of the cost of using the facilities -- are likewise permissible. *See* Hellerstein, 87 Mich. L. Rev. at 157-58. But the $100 assessment at issue in this case is not; because Michigan's levy is entirely unapportioned, its burden plainly falls more heavily on carriers operating both intra- and inter-state than on those operating only within the state. That places the former at a distinct disadvantage in the Michigan market. Moreover, if other states were to impose such a levy, interstate carriers would be further disadvantaged. Accordingly, Michigan's assessment – like the axle levy invalidated in *Scheiner* – fails the internal consistency test and impermissibly burdens interstate commerce regardless of whether it is called a tax or a fee.

III. OLDER CASES SUGGESTING THAT STATES MAY IMPOSE FLAT TAXES ON INTRASTATE MOTOR ROUTES WERE OVERRULED BY *SCHEINER* AND OTHER MODERN CASES.

In *Osborne v. Florida*, 164 U.S. 650 (1897), and *Pullman Co. v. Adams*, 189 U.S. 420 (1903), this Court approved unapportioned flat taxes on express companies that provided intrastate shipping services as well as interstate shipping services. In both cases, the Court explained that a tax tied to the provision of interstate shipping services would clearly have been unconstitutional, but stated that regulation of purely intrastate shipments does not "improperly affect[] interstate commerce." *Osborne*, 164 U.S. at 655; *Pullman Co.*, 189 U.S. at 422 ("The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce."). Those cases are not controlling because the two critical assumptions on which they are based are no longer valid.

First, the cases are inconsistent with the modern rule that taxation of wholly intrastate activity can affect interstate commerce and therefore must pass constitutional muster. In *Camps Newfound/Owatonna Inc. v. Town of Harrison*, 520 U.S. 564 (1997), for example, the Court considered the constitutionality of a Maine tax exemption for "benevolent and charitable institutions." *Id.* at 568 (internal quotations omitted). The petitioner, a summer camp run by a church, was not entitled to a tax exemption because 95% of its campers came from outside Maine. *Id.* at 567. The taxing authority argued that the dormant Commerce Clause did not reach purely intrastate activities and that "the camp's 'product is delivered and "consumed" entirely within Maine.'" *Id.* at 572 (quoting the Town's brief). The Court rejected that argument, citing a string of cases decided under the affirmative Commerce Clause that had found purely local

activities to affect interstate commerce. *Id.* at 572-73 (*citing, inter alia, Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964)). As the Court explained, "[e]ven when business activities are purely local, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." 520 U.S. at 573 (internal quotation marks omitted). Similarly, in *Commonwealth Edison Co. v. Montana* , 453 U.S. 609, 615 (1981), the Court applied the *Complete Auto* four-part test to a severance tax applicable to coal mined in-state, holding that it had "long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity."

Second, the older cases also fail to account for the modern rule that state taxes must be apportioned. As noted above, *Scheiner* held that the apportionment requirement, as measured through the internal consistency test, requires flat taxes to be justified on the ground that "they are the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens." 483 U.S. at 296. Indeed, in *Scheiner* the Court expressly overruled three older decisions that had affirmed flat taxes on interstate highway traffic on the ground that they relied on superseded formalistic distinctions. 483 U.S. at 292-96 (overruling *Clark v. Poor*, 274 U.S. 554 (1927), *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n*, 295 U.S. 285 (1935), and *Aero Mayflower Transit Co. v. Bd. of Ry. Comm'rs*, 332 U.S. 495 (1947)).

Taken together, this Court's recent rulings establish that (1) taxation of purely intrastate activity implicates dormant Commerce Clause concerns and (2) facially neutral unapportioned flat taxes are unconstitutional unless

apportioning would be infeasible. *Osborne* and *Pullman Co.* are no longer valid because they are inconsistent with those principles.

Moreover, it would not be sensible to distinguish this case from *Scheiner* on the ground that the Michigan fee applies only if a trucker picks up a load in Michigan for delivery in the State, while the Pennsylvania axle tax applied to any truck entering the state. As we have shown, the Michigan fee, like the Pennsylvania axle tax, has a discriminatory effect, penalizing truckers that do business outside of Michigan as well as within the State. The Michigan fee also has a protectionist component, since it discourages interstate truckers from picking up loads in Michigan for delivery in the State, hence limiting competition with in-State truckers. The Pennsylvania axle tax, in contrast, had no such protectionist effect. It would be a curious distinction to preserve state laws that have a protectionist *and* a discriminatory effect from Commerce Clause challenge, while striking down state laws that have a discriminatory effect only.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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No. 03-1230

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC. and USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF OF AMICI CURIAE DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION; CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY; ECONOMY TRANSPORT, INC.; MASON & DIXON LINES, INC.; ROMEO EXPEDITORS, INC.; WESTLAKE TRANSPORTATION, INC.; VANDERKOOI CARRIERS, INC.; GERIG'S TRUCKING & LEASING, INC.; AND BEST WAY EXPRESS, INC. IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICI CURIAE

Deeco Services, Inc., d/b/a Deeco Transportation; Calcut Sales & Services, Inc., d/b/a Calcut Trucking Company; Economy Transport, Inc.; Mason & Dixon Lines, Inc.; Romeo Expeditors, Inc.; Westlake Transportation, Inc.; VanDerKooi Carriers, Inc.; Gerig's Trucking & Leasing, Inc.; and Best Way Express, Inc. respectfully submit this brief as amici curiae in support of the Petitioners American Trucking Associations, Inc. and USF Holland, Inc.[1] The amici are all motor carriers operating in interstate commerce pursuant to authority granted them by the former Interstate Commerce Commission, now administered by the Federal Motor Carrier Safety Administration of the United States Department of Transportation. Three of the amici are based in Indiana (Gerig's in Fort Wayne and Westlake and Best Way in Vincennes) and a fourth in Florida (Economy in Tampa), while the remainder of the amici are based in Michigan. The amici have also operated in Michigan intrastate commerce. All of the amici pay the $100 fee upon trucks conducting intrastate operations. All of the amici were named class representatives in the underlying action before the Michigan Court of Claims.

The $100 annual levy upon each truck conducting intrastate operations by Michigan transgresses the Commerce Clause of the United States Constitution. That intrastate levy constitutes a continuing burden on the

[1] Pursuant to Rule 37.6, amici certify that no counsel for any party in No. 03-1230 or No. 03-1234 authored this brief in whole or in part. No persons other than the amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' consent to the filing of this brief have been filed with the Clerk.

interstate operations of the amici. That intrastate charge has drastic implications for the Michigan-based members of the amici, as well as for the non-Michigan based members, all of which have conducted both interstate and Michigan intrastate operations. The intrastate and interstate operations of the motor carriers are inextricably intertwined to maximize operating efficiencies and fleet utilization. Congress in 1994 recognized this when it found that intrastate economic regulation burdened INTERSTATE commerce, and preempted the same. Yet, the Michigan $100 annual fee upon each truck conducting intrastate operations is not in any way apportioned to the amount of Michigan intrastate activity conducted by a carrier. The former economic regulatory barriers to entry in the truck transportation industry have been removed by deregulatory acts of Congress affecting both interstate and intrastate transportation. If the Michigan intrastate fee is allowed to stand, it will serve as an invitation for all of the states to construct a new barrier through the enactment and imposition by other states of fees similar to Michigan's, thereby inhibiting interstate commerce. Respondents' counsel, in oral argument before the Michigan Court of Appeals in December of 2002, estimated that $75,000,000 was then at issue in this case alone.[2] Accordingly, amici urge this Court to find the $100 fee upon trucks conducting intrastate operations to be a burden on

[2] Presumably, that $75,000,000 figure included both the challenged Michigan intrastate fee in this case and the challenged Michigan interstate fee in Case No. 03-1234. Also, the Respondents' estimate could not have taken into account those fees levied toward the 2004 and 2005 calendar years, and may not have included the amount for 2003 (the fees are collected for the next calendar year by December 31 of the prior year).

interstate commerce and violative of the United States Constitution's Commerce Clause.

SUMMARY OF ARGUMENT

The motor carrier amici have all conducted combined interstate/intrastate operations in Michigan, as well as in other states. These operations are extensive geographically. The Michigan intrastate portion of those operations is only a fraction of these carriers' overall operations, which involve operations in interstate commerce, as well as intrastate operations in other states, and, for certain carriers, foreign commerce involving Canada. The interstate authority held by these carriers is, in fact, national in scope. Yet, the amici carriers pay the same $100 annual fee per truck pursuant to the intrastate fee statutory provision at MCL 478.2(1), regardless of the proportion of Michigan intrastate activity to the carriers' overall operations, because the Michigan fee is a flat annual charge. It is the same kind of flat annual charge that this Court has found to offend the Commerce Clause in *American Trucking Associations, Inc. v. Schiener*, 483 U.S. 266 (1987). This unapportioned fee is a burden on interstate commerce. It should be struck down.

ARGUMENT

I. AS THE AMICI ARE ALL MULTI-STATE BUSINESSES, THE ASSESSMENT OF THE FLAT FEE UPON THEM DOES NOT CONSTITUTE FAIR APPORTIONMENT OF THE FEE.

Each of the amici is a multi-state business. Their motor vehicle fleets travel over the highways of Michigan, operating in both interstate and intrastate commerce. They also operate over the highways of other states in interstate commerce, in intrastate commerce, and, in the case of some of the amici, in foreign commerce (over the highways of Canada). The same equipment of these motor carriers is used to operate in both intrastate and interstate commerce. When a shipment needs to be picked up, it makes economic sense, from an efficiency as well as a customer-service standpoint, to dispatch the closest unit with available capacity to pick up a shipment at a consignor's address and commence its journey toward destination, whether that unit is loaded with intrastate freight and/or interstate freight or empty, and whether or not the new shipment is of an interstate character or intrastate character. The motor carrier fleets of the amici are constantly being used in both interstate and intrastate capacities (and, with respect to intrastate capacities, in Michigan as well as other states). If carriers were required to dedicate portions of their fleet to either interstate or intrastate commerce (and, in the case of intrastate commerce, to intrastate commerce in particular states), the operational and service inefficiencies would be mind-boggling. The multi-state nature of the amici's operations is further affected by the character and consistency of Michigan's economy and geography, with the largest percentage of its population lying within 100 miles of its

southern borders with Indiana and Ohio, and its automobile industry activity tied to suppliers and plants located in Canada, Mexico, New York, Pennsylvania, Ohio, Indiana, Illinois, and Wisconsin, as well as other more distant states and overseas locations.

Despite the multi-state nature of the amici's business, however, they must pay the levy of $100 per truck per year, regardless of the amount of their activity in Michigan intrastate commerce. The less significant is a carrier's intrastate operations in Michigan, the greater is the burden of the Michigan intrastate fee.

Further, operating as they do in a multitude of states, the amici carriers would face a staggering cost if other cash-starved states adopted a Michigan-like fee structure for the ostensible privilege of providing intrastate transportation in a particular state. The wider the carrier's operations, the greater would be that burden – up to $4,800 a year per truck for a carrier with operations across the continental United States.[3] A levy of that magnitude constitutes a ponderous burden on interstate commerce and would undoubtedly lead to the making of economic choices as to where and whom to serve, protecting intrastate markets from competition thereby. The free flow of commerce would be impeded.

To prevent the imposition of state taxes which violate the Commerce Clause, this Court articulated the four-part test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274,

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[3] Of course, this assumes the states would only levy a $100 fee like Michigan. If the states charged more than $100, the burden would become correspondingly greater.

279 (1977), in which it was held that a state tax would be unconstitutional unless it:

> . . . is applied to an activity with a substantial nexus with a taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state.

That a flat tax on interstate truck transportation could not meet the *Complete Auto* test was established by *Schiener*, which struck down Pennsylvania's "marker fee" as well as "axle tax."

The Michigan flat fee is not fairly apportioned consistent with *Complete Auto*. Certainly, when the internal consistency of this intrastate fee is examined, in line with the decision of this Court in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995), it could not be clearer that Michigan is grabbing more than its fair share of interstate transactions from carriers with multi-state businesses, such as amici.[4]

II. THE MICHIGAN INTRASTATE FEE DISCRIMINATES AGAINST MULTI-STATE CARRIERS, SUCH AS AMICI.

Any multi-state carrier, i.e., one conducting interstate and/or foreign operations, which also conducts intrastate

[4] An Indiana-based carrier conducting both interstate and intrastate operations in Michigan but deriving only three percent of its overall revenues from Michigan intrastate commerce, still pays the flat $100-per-truck fee to Michigan, just as does the Michigan-based carrier operating only in Michigan intrastate commerce. This demonstrates the manner in which the Michigan flat tax is an unapportioned anchor on interstate commerce.

operations in Michigan, is discriminated against. This is because it must pay the $100 per truck per year for the privilege of conducting intrastate operations regardless of the extent to which it conducts intrastate operations. If it does not register its fleet for Michigan intrastate operations, it threatens the quality of its service. This is because a carrier with an empty unit in Kalamazoo, Michigan, for example, designated interstate only, could not pick up an urgent shipment destined for Detroit, because the unit had not been registered through payment of the intrastate fee. The transportation world does not work in such a compartmentalized fashion.

Yet, the only way for a carrier to maximize the benefit of the intrastate fee is to limit a carrier's operations to Michigan only. The amici carriers, being all multi-state businesses, can never make "full use" of the intrastate levy that has been imposed upon them in Michigan. This intrastate fee, accordingly, cannot be interpreted in any way in which it is not discriminatory. It is not the degree of discrimination which renders the fee unconstitutional, but rather the discrimination itself. Because that discrimination exists, this fee should be adjudged unconstitutional under the Commerce Clause, and the decision of the Michigan Court of Appeals reversed.

Discriminatory barriers to the provision of efficient and economical intrastate/interstate truck service by multi-state carriers should be eliminated, not encouraged. Yet, Michigan seeks to maintain its barrier here. Congress, upon passage of the Federal Aviation Administration Authorization Act of 1994, Pub. L. 103-305, Sec. 601, 108 Stat. 1605 (1994), made the particular finding that:

> The regulation of intrastate transportation of property by the states has
>
> (A) imposed an unreasonable burden on interstate commerce;
>
> (B) impeded the free flow of trade, traffic and transportation of interstate commerce; and
>
> (C) placed an unreasonable cost on the American consumers.

The continued imposition by Michigan of an unapportioned fee for the conduct of intrastate operations within its borders similarly burdens and obstructs interstate commerce in a pernicious way that violates the Commerce Clause. This discrimination can only be ended by holding that such a fee is unconstitutional.

CONCLUSION

For the reasons stated, the Court should hold that the Michigan $100 flat fee upon trucks conducting intrastate operations runs afoul of the Commerce Clause of the United States Constitution and reverse the decision of the Michigan Court of Appeals.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.

Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U.S.C. § 14504.

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INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. For over twenty years it has defended principles of

[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

limited government and individual liberty, including principles of commercial freedom. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF has a strong interest in ensuring that the States do not impose unconstitutional burdens on the free and unrestricted flow of goods and services through interstate commerce, as has the State of Michigan by enacting the vehicle fee at issue here.

STATEMENT

Petitioners challenge a $100 fee imposed by M.C.L. § 478.2(1) on each vehicle that travels within the State of Michigan on the ground that it violates the Commerce Clause. *See Westlake Transp., Inc. v. Michigan Public Serv. Comm'n*, 662 N.W.2d 784, 802 (Mich. App. 2003). The fee is imposed on any vehicle that operates within the State pursuant to a certificate of authority. *Id.* Accordingly, it applies to both carriers that travel solely intrastate and those that travel both intrastate and interstate. *Id.* at 803. Petitioners argue that the vehicle fee violates the Commerce Clause because it imposes a heavier per-mile burden on carriers that operate interstate than those that operate solely within the State of Michigan. *See id.* Unlike a fee that is apportioned based on mileage within the State, the Michigan fee is a flat annual fee. *Id.* As a result, the per-mile burden on interstate carriers is significantly greater.

Petitioners further contend that the fee adversely influences commercial behavior. According to petitioners, "in order to receive the greatest benefit for the fee, a carrier would need to maximize its intrastate operations and this could potentially affect a carrier's economic decisions by discouraging an intrastate carrier from engaging in interstate commerce." *Id.* In contrast, interstate carriers have an incentive to "top off their interstate loads with intrastate hauls or transport intrastate loads in between interstate hauls." *Id.* at 804.

The Michigan Court of Appeals held that the fee did not violate the Commerce Clause. Its decision turned on the fact that the fee was characterized as a regulatory measure, rather than a tax. Based on this conclusion, the court refused to apply the four-part test this Court articulated in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), which would have required that the court hold that Michigan's vehicle fee unconstitutionally burdened interstate commerce.

SUMMARY OF ARGUMENT

The text, structure, and history of the Constitution demonstrate that the Framers intended to protect and nurture the free and unrestricted flow of goods and services among the States. A variety of provisions expressly prohibit State action that discriminates against or disproportionately burdens interstate commerce. From the Commerce Clause, to the Import-Export Clause, to the Privileges and Immunities Clause, the Constitution is filled with measures that make clear that such State action is prohibited.

An analysis of the constitutional structure further supports this conclusion. The States are "co-equal sovereigns" within the federal system. The natural equality of the States within that system prohibits State action that seeks to advantage one State over another. Measures such as those at issue here, which have the effect of discriminating against the goods and services of other States, are flatly inconsistent with the constitutional structure.

Finally, the historical record demonstrates that those responsible for drafting and ratifying the Constitution sought to ensure that the flow of goods and services among the States would remain unrestricted. The provisions ultimately embodied in the Constitution were strongly motivated by fundamental principles that encouraged free and unrestricted

trade as well as practical concerns over commercial disputes that had arisen under the Articles of Confederation. These concerns led the Framers to put commercial union front and center in drafting the Constitution, embodying numerous safeguards in the constitutional text that would ensure that commerce among the States would be unrestricted.

ARGUMENT

I. The Text And Structure Of The Constitution Prohibit The States From Taking Actions That Impede The Free And Unrestricted Flow Of Goods And Services Among The States.

The text and structure of the Constitution make clear that burdens upon interstate commerce such as those enacted by the State of Michigan are prohibited. Not only the Commerce Clause, but also several other provisions of the Constitution, demonstrate the Framers' desire that commercial intercourse among the States remain free and unrestricted. The Court has made clear that such provisions prohibit States from enacting any measures—whether in the form of "taxes" or "regulations"—that would burden or restrict the free flow of goods and services.

A. The Commerce Clause.

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87

(1984).[2] Accordingly, the Court has observed that the clause embodies "a limitation on state regulatory powers." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996). Indeed, it has held that "'[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States.'" *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981) (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)).

Under the clause, the States may not "burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 98 (1994). Accordingly, "[t]he negative or dormant implication of the Commerce Clause prohibits state taxation, *or regulation*, that discriminates against or unduly burdens interstate commerce and thereby 'impede[es] free private trade in the national marketplace.'" *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)) (emphasis added). The Court's "Commerce Clause jurisprudence has shown that even the *smallest scale* discrimination can interfere with the project of our Federal Union." *Camps Newfound/Owatonna, Inc. v. Town of*

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[2] *See also Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995) ("[W]e have consistently held this language [of the Commerce Clause] to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject."); *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7-8 (1986) ("[W]e have acknowledged the self-executing nature of the Commerce Clause and held on countless occasions that, even in the absence of specific action taken by the Federal Government to disapprove of state regulation implicating interstate or foreign commerce, state regulation . . . may be invalid under the unexercised Commerce Clause."); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981) ("It is now well established . . . that the Clause itself is 'a limitation upon state power even without congressional implementation.'") (quoting *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977)).

Harrison, Maine, 520 U.S. 564, 595 (1997) (emphasis added). Such discrimination is therefore prohibited.

B. The Import-Export Clause.

Similarly, the Import-Export Clause prohibits specific barriers to the free exchange of goods and services among the States. That clause provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports." U.S. CONST. art. I, § 10, cl. 2. While the Court construed the clause decades after its enactment as prohibiting only taxes on foreign goods, *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1868), as members of the Court recently observed, the Court's "rule that state taxes that discriminate against interstate commerce are virtually *per se* invalid under the negative Commerce Clause may well approximate the apparent prohibition of the Import-Export Clause itself." *Camps Newfound/Owatonna*, 520 U.S. at 636 (Thomas, J., dissenting). The plain language of the clause provides "an *express* check on the States' power to levy certain discriminatory taxes on the commerce of other States." *Id.* at 610 (emphasis added).

This prohibition was designed to address a specific and significant concern under the Articles of Confederation. "From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 438 (1827). Indeed, "one of the first criticisms leveled against the Articles of Confederation during the ensuing Federal Convention was the general Government's inability to prevent 'quarrels between states,' including those arising from the various 'duties' the States imposed upon each other, both on foreign goods moving through the seaport States and on each other's goods." *Camps Newfound/Owatonna*, 520 U.S. at 630 (Thomas, J., dissenting) (quoting 1 FARRAND 19,

25 (Edmund Randolph, May 29)). In order to remedy this significant problem, such duties upon goods and services traveling in interstate commerce were expressly prohibited.[3]

C. The Privileges And Immunities Clause.

The Privileges and Immunities Clause of Article IV, Section 2 similarly ensures that there is no discrimination against other States. The clause provides that "[c]itzens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. It was designed to "place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868).

While the clause was interpreted decades after its ratification as applying solely to individuals and not corporations, *see Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 656 (1981), it nonetheless evidences the Framers' intent to ensure free and unrestricted commercial intercourse among the States. Thus, the Court has specifically applied the clause to invalidate State action that has the effect of discriminating against citizens from other States, including in areas involving economic activity. *See Barnard v. Thorstenn*, 489 U.S. 546, 552 (1989); *Toomer v. Witsell*, 334 U.S. 385, 396 (1948); *see*

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[3] Given the plain language of the constitutional text, the Court may wish to "consider restoring the original Import-Export Clause check on discriminatory state taxation to what appears to be its proper role" and overrule *Woodruff v. Parham*. *See Camps Newfound/Owatonna*, 520 U.S. at 610 (Thomas, J., dissenting). "[A] strong argument can be made that for the Constitution's Framers and ratifiers—representatives of States which still viewed themselves as semi-independent sovereigns—the terms 'imports' and 'exports' encompassed not just trade with foreign nations, but trade with *other States* as well." *Id.* at 621 (emphasis in original).

also United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 221-22 (1984).

Moreover, the Court has made clear that the guarantees under the Commerce Clause and those under the Privileges and Immunities Clause are interrelated. Accordingly, it has explicitly adopted reasoning from cases addressing claims under the Privileges and Immunities Clause in its decisions addressing claims under the negative Commerce Clause. *See Hughes v. Oklahoma*, 441 U.S. 322, 334 (1979) (reasoning "stated in reference to [a] Privileges and Immunities Clause challenge" was "equally applicable to [a] Commerce Clause challenge"). As with the Commerce and Import-Export Clauses, the Privileges and Immunities Clause serves to ensure that commerce among the States remains unrestricted.

D. The Constitutional Structure.

Finally, the constitutional structure itself further demonstrates the necessity of free and unrestricted commercial interchange among the States. Under the Constitution, the States are "'coequal sovereigns in a federal system.'" *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982). The "structure of our Nation" is "a union of States, each possessing equal sovereign powers." *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 704 (1982). Thus, for example, "all States are admitted to the Union with the same attributes of sovereignty (i.e., on equal footing) as the original 13 States." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203 (1999) (citing *Coyle v. Smith*, 221 U.S. 559 (1911)). In sum, there is a "constitutional rule of equality among the states." *State of Oklahoma v. State of Texas*, 258 U.S. 574, 583 (1922).

As a result, each State has certain rights and obligations as a member of the federal union. To the extent permitted by Congress, the States are required to give "Full Faith and

Credit" to other States' public acts. *See* U.S. CONST. art. IV, § 1. The Constitution ensures that they maintain a "Republican Form of Government." *Id.* art. IV, § 4. All of these provisions are designed to ensure that the States continue to function as free and equal components of the federal system. Indeed, the Court has explained that "the constitutional equality of the states is *essential* to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution." *Coyle v. Smith*, 221 U.S. 559, 580 (1911) (emphasis added).

This natural equality of the States requires that they not impose measures that discriminate against commerce from other States. If nothing else, the equality of rights and obligations under the federal system means that no single State can take measures that disadvantage other States. Quite simply, "the whole Federal system is based upon the fundamental principle of the equality of the states under the Constitution." *Bolln v. Nebraska*, 176 U.S. 83, 89 (1900).

II. The Historical Record Demonstrates That The Constitution Was Intended To Ensure The Free And Unrestricted Flow Of Goods And Services Among the States.

The historical record confirms that these structural features were intended to broadly prohibit any State action that might burden or restrict the free flow of goods and services in interstate commerce. As this Court has observed, "history, including the history of commercial conflict that preceded the Constitutional Convention as well as the uniform course of Commerce Clause jurisprudence animated and enlightened by that early history provides the context in which each individual controversy must be judged." *Camps Newfound/Owatonna*, 520 U.S. at 595. Here, that history uniformly demonstrates that the Framers sought to prohibit

State action, such as that here, which impedes the free and unrestricted flow of commerce among the States.

A. The Constitutional Convention And Ratification Debates.

Under the Articles of Confederation, the States had "fettered, interrupted and narrowed" the free exchange of goods and services. THE FEDERALIST NO. 11 (Alexander Hamilton). As noted in *The Federalist No. 22*, "[t]he interfering and unneighbourly regulations of some States contrary to the true spirit of the Union, have in different instances given just cause of umbrage and complaint." THE FEDERALIST NO. 22, at 104 (Alexander Hamilton) (Bantam 1982).

One of the primary purposes of the new Constitution was to remedy this problem and ensure that there would be free and unrestricted trade among the States in the federal union. "The great object of the Constitution was to erect a government for commercial purposes, for mutual intercourse, and mutual dealing. The prosperity of every state could alone be promoted and secured by establishing these on principles of reciprocity." *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 526 (1839). In particular, provisions such as the Commerce Clause reflect "a central concern of the Framers that was an immediate reason for calling the Constitutional Convention," namely, "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995).

The Federalist No. 7 warned, for example, that if the Constitution were not ratified, "competition of commerce" among the States would be a "fruitful source of contention." THE FEDERALIST NO. 7, at 29 (Alexander Hamilton). "Each

State, or separate confederacy, would pursue a system of commercial polity peculiar to itself. This would occasion distinctions, preferences and exclusions, which would beget discontent. The habits of intercourse, on the basis of equal privileges, to which we have been accustomed from the earliest settlement of the country, would give a keener edge to those causes of discontent, than they would naturally have, independent of this circumstance." *Id.* This "discontent" would, in turn, "naturally lead to outrages, and these to reprisals and wars." *Id.* at 29-30.

The same concerns were expressed during the Constitutional Convention. Luther Martin argued that "the States like individuals were in a State of nature equally sovereign & free," and that as a result, they must be "treat[ed] as free states with each other, upon the same terms of equality that men originally formed themselves into societies." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 437-38, 440 (Max Farrand ed., rev. ed. 1937) (citing Vattel, Rutherford and Locke). This natural equality required that no State take actions that might disadvantage other States in the federal union. In particular, it required that the States not burden or discriminate against interstate commerce.

The proposed Constitution provided a solution by implementing several measures that would ensure free and unrestrained trade among the States. The Framers underscored this aspect of the founding document in advocating for its ratification: "An unrestrained intercourse between the States themselves will advance the trade of each, by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigour from a free circulation of the commodities of every part." THE FEDERALIST NO. 11, at 53 (Alexander Hamilton).

B. Early Judicial Interpretation.

This Court has consistently recognized these same principles in interpreting the constitutional text. Thus, for example, it has "endorsed Justice Johnson's appraisal" in *Gibbons v. Ogden* that "the Commerce Clause had not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power." *Camps Newfound/Owatonna*, 520 U.S. at 571. In *Gibbons*, Justice Johnson observed that "[i]f there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231-32 (1824) (Johnson, J.). This constitutional purpose was designed to remedy the commercial discord under the Articles of Confederation, which had allowed a "conflict of commercial regulations, destructive to the harmony of the States." *Id.* at 224.

The Court has consistently and resolutely applied these principles in its subsequent decisions. *See Camps Newfound/Owatonna*, 520 U.S. at 571. It has consistently prohibited any measures that "burden" or "discriminate" against interstate commerce. *Oregon Waste Sys.*, 511 U.S. at 98. In doing so, it has consistently prohibited even the "smallest scale discrimination." *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 595. In the process, it has underscored that the Constitution has created "an area of free trade among the several States.'" *Commonwealth Edison Co. v. Montana*, 453 U.S. at 618. As Justice Johnson observed nearly two hundred years ago, the Constitution was designed "to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons*, 22 U.S. at 231-32.

III. Michigan's Fee Upon Vehicles Violates The Constitutional Text And Structure.

The vehicle fee at issue here violates these established principles. Whether the measure is characterized as a "regulation" or a "tax", the effect is the same. It erects an unnatural impediment to commercial intercourse among the States. It is for this very reason that this Court in *Scheiner* held that a nearly identical measure was unconstitutional. 483 U.S. at 284-86.

In *Scheiner*, the Court considered the constitutionality of a tax on vehicles traveling in intrastate commerce enacted by the State of Pennsylvania. *Id.* In invalidating the measure as a violation of the negative Commerce Clause, the Court made clear that discriminatory state enactments could not be salvaged by reliance upon "formalism". *Id.* at 296. Rather, it emphasized that the critical element in determining the constitutionality of State action under the Commerce Clause was whether the action "produces a forbidden effect." *Id.*[4] *See also Camps Newfound/Owatonna*, 520 U.S. at 575 ("To allow a State to avoid the strictures of the dormant Commerce Clause by the simple device of labeling its discriminatory tax a levy on real estate would destroy the barrier against protectionism that the Constitution provides.").

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[4] *See also American Trucking Associations, Inc. v. New Jersey*, 852 A.2d 142, 164 (N.J. 2004) ("We reject the State's contention that as long as a 'flat fee' is a 'regulatory user fee,' it is not subject to the four-prong test of *Complete Auto Transit*. Such a view ignores the underlying rationale of *Scheiner* that it is the practical effect of the charge that controls, not its formal language or purported structure."); *American Trucking Associations, Inc. v. Secretary of State*, 595 A.2d 1014, 1016 (Me. 1991) ("[I]t would seem that a tariff such as the one imposed here is forbidden if it produces the prohibited discriminatory effects on interstate commerce whether designated as a 'fee' or a general revenue 'tax.'").

Applying this test, the Court struck down the tax on the ground that it violated the "internal consistency" standard articulated in *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). *See Scheiner*, 483 U.S. at 284-86. The Court held that the tax was unconstitutional because there would undoubtedly be an "impermissible interference with free trade" if such taxes were "applied by every jurisdiction." *Id.* As in this case, the tax at issue in *Scheiner* did not "vary directly with miles traveled or with some other proxy for value obtained from the State." *Id.* at 291. Rather, it was a flat tax that was not "fairly apportioned" based upon a carrier's use of State services. *Id.* at 294-95. The Court observed that "[w]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude . . . that the State is imposing an undue burden on interstate commerce.'" *Id.* at 291 (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 629 (1981)).

At the same time, the Court made clear that the fact that a tax or other State action "extends the same nominal privilege to interstate commerce that it extends to in-state activities" does not save it from these constitutional requirements. *Id.* at 296. State action violates the Commerce Clause "'when it unfairly burdens commerce by exacting more than a just share from the interstate activity.'" *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 247 (1987) (quoting *Washington Dep't of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 748 (1978)). A State may not "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). Quite simply, "[t]he great constitutional purpose" of the Framers in implementing the Commerce Clause "cannot be defeated by using an apparently neutral 'guise of taxation which produces the excluding or discriminatory effect.'" *Scheiner*, 483 U.S. at 296 (quoting *Nippert v. Richmond*, 327 U.S. 416,

426 (1946)). *See also id.* at 282 (Commerce Clause "prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States").[5]

The Court in *Scheiner* concluded that an unapportioned tax on vehicles traveling within a State violated these principles. Moreover, it determined that it was well within the State's ability to erect a regulatory regime that would not impose an unconstitutional restraint upon interstate commerce. The State could have apportioned the fee based on the actual mileage that registered vehicles traveled in the State. *See id.* at 291. One simple means of accomplishing this task would be to use a fuel consumption tax that would by definition be "directly apportioned to the mileage traveled." *Id.* at 283. *See also American Trucking Associations, Inc. v. Secretary of Administration*, 613 N.E.2d 95, 103 (Mass. 1993) (discussing constitutionality of fuel consumption taxes). Yet, the State rejected this

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[5] The fact that a regulation governs only intrastate activity is irrelevant. The Court has "long . . . rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity." *Montana*, 453 U.S. at 615. "Even when business activities are purely local, if 'it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.'" *Camps Newfound/Owatonna*, 520 U.S. at 573-74 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964)).

Nor is there any "'*de minimis*' defense to a charge of discriminatory taxation under the Commerce Clause." *Id.* at 581 n.15 (quoting *Fulton Corp.*, 516 U.S. at 334 n.3). "[A]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred.'" *Id.* (quoting *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994)).

constitutional alternative in favor of a flat fee that had the effect of discriminating against interstate commerce.

The same analysis demonstrates that Michigan's vehicle fee is unconstitutional. As the Court emphasized in *Scheiner*, whether state action violates the Commerce Clause depends upon whether it produces "a forbidden *effect*." 483 U.S. at 296 (emphasis added). The vehicle fee here has an effect that is identical to that of the tax at issue in *Scheiner*—namely, it disproportionately burdens interstate carriers. The text, structure, and history of the Constitution all demonstrate that such measures, which restrict the free flow of goods and serves among the States, are expressly prohibited.

CONCLUSION

For the foregoing reasons, Eagle Forum ELDF respectfully requests that the Court uphold the Constitution's prohibition on State action that restricts the free flow of goods and services and reverse the Court of Appeals' decision.

Respectfully submitted,

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Dated: February 28, 2005

No. 03-1230

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC., PETITIONERS,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL., RESPONDENTS.

On Writ of Certiorari to the Michigan Court of Appeals

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, DELAWARE, HAWAII, IDAHO, IOWA, MAINE, MASSACHUSETTS, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the $100 fee imposed by Michigan upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.

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INTEREST OF THE AMICI CURIAE

The 21 *amici* States submit this brief in support of the Respondents, the Michigan Public Service Commission, *et al.*, to urge affirmance of the judgment of the Michigan Court of Appeals that Michigan's $100 annual flat fee on vehicles that make intrastate deliveries does not violate the dormant Commerce Clause. The States have a compelling interest in this case because the position of the Petitioners, the American Trucking Associations, Inc. and USF Holland, Inc. (hereafter, "ATA"), threatens the States' ability to levy taxes and fees on commercial activities that take place within their borders. The decision here will undoubtedly impact this important component of the States' sovereign powers.

SUMMARY OF ARGUMENT

The core concerns of the dormant Commerce Clause are not implicated by Michigan's flat fee on intrastate trucking. The fee does not facially discriminate against out-of-state or interstate entities; there is no discriminatory or protectionist intent; and the fee does not impose extraterritorial pricing or regulation. ATA's argument, therefore, comes down to the propositions that (1) Michigan's flat fee fails the internal consistency test (as ATA describes the test) because if all States imposed an identical fee, it would burden multi-state companies more than local companies; and (2) Michigan's flat fee discriminates against interstate commerce because multi-state trucking companies use Michigan roads less than local trucking companies and therefore pay the fee at a higher effective rate. Neither argument withstands scrutiny.

I. ATA's math, at least, is correct: If every State imposed the same fee as Michigan, a company conducting intrastate operations in all 48 contiguous States would pay $4800 in fees, while a company conducting such operations in only one State would pay $100. See ATA Br. 14. A central issue in this case is whether

Michigan's fee—and possibly numerous other flat fees and taxes imposed on both interstate and intrastate activities—are unconstitutional for that reason alone. The answer is no.

The premise of ATA's version of the internal consistency test is that the Constitution protects companies that operate in multiple States from having to bear burdens not borne by companies that operate in only one State. That premise is irreconcilable with our federalist system, which embraces the power of States to adopt diverse laws. A host of state regulations—including safety laws, labeling laws, and reporting requirements—burden companies that operate in multiple States more than companies that operate in only one State. Our Federalism would be turned upside down if every state law having that effect were deemed unconstitutional.

Nor does ATA's theory find any support in general dormant Commerce Clause principles and doctrine. State regulations violate the dormant Commerce Clause when they discriminate against interstate commerce on their face or impose burdens on interstate commerce that are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Neither rule invalidates state laws merely for having the commonplace effect of burdening multi-state companies more than one-state companies.

This Court's jurisprudence regarding the dormant Commerce Clause's application to state taxes likewise does not invalidate state taxes having that effect. The Court has expressly recognized that companies conducting business in multiple States may be subjected to multiple taxes, so long as each State taxes its fair share of the transactions. ATA's version of the internal consistency test does not advance that fair apportionment concern because it insulates multi-state companies from paying taxes on activities that no other State could tax (such as the privilege of doing business in a particular State). ATA's expansive and unprecedented theory renders vulnerable numerous types of state taxes and fees of longstanding pedigree.

ATA asserts that in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), this Court adopted its version of the internal consistency test. Not so. The Court invalidated the Pennsylvania flat taxes at issue in *Scheiner* because they imposed much higher effective tax rates on out-of-state companies than on local companies and erected a barrier around the State, deterring vehicles from entering. The Court did not hold (even as to taxes on interstate activities) that the Constitution protects companies that operate in multiple States from having to bear tax burdens not borne by companies that operate in only one State. Nor has the Court used the internal consistency test in any other case to "protect" multi-state companies from such taxation.

II. ATA seeks to extend *Scheiner* to fees imposed on intrastate activities. Even if this Court accepts ATA's reading of *Scheiner*, it should not take that additional step. In contrast to the Pennsylvania taxes at issue in *Scheiner*, fees imposed on point-to-point deliveries within a State are not barriers to entry into the State. Moreover, States and local governments impose flat license and other fees on countless intrastate business operations, from operating a taxicab to owning a restaurant to running a laundromat. There is no reason why a company seeking to engage in one of those businesses in more than one State should not pay a fee in each State in which it operates. Abundant and well-established case law supports that proposition.

III. Michigan's flat fee on intrastate trucking operations satisfies the test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Only two of the four prongs of *Complete Auto* are at issue here: fair apportionment and discrimination. Michigan's

fee raises no fair apportionment concerns because it is imposed on an intrastate activity to fund intrastate regulatory measures. The fair apportionment objective of "ensur[ing] that each State taxes only its fair share of an interstate transaction," *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989), is not implicated here. As to discrimination, Michigan's fee does not discriminate on its face and ATA has failed to present any evidence that it discriminates in effect. Michigan's fee, therefore, is valid under the Commerce Clause.[1]

ARGUMENT

MICHIGAN'S FLAT FEE ON TRUCKS CONDUCTING INTRASTATE OPERATIONS DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

ATA writes as though its position is merely a straightforward application of well-established doctrine. According to ATA, the Court in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), held that all flat taxes imposed on interstate activities violate the dormant Commerce Clause because, if every State imposed the same tax, companies that operate in multiple States will bear tax burdens not borne by companies that operate in only one State. ATA Br. 14. ATA then asks the Court to apply that rule to flat fees on intrastate activities. Things are not quite that simple.

The rule ATA believes (incorrectly) that *Scheiner* adopted with respect to interstate activities conflicts with fundamental principles of federalism and has no basis in this Court's Commerce Clause jurisprudence. And even assuming, *arguendo*, that *Scheiner* did

[1] Michigan's brief urges affirmance on several other grounds, which, for the sake of brevity, are not repeated herein. This brief assumes, *arguendo*, that Michigan's fee is subject to the *Complete Auto* test and that Michigan is administratively capable of apportioning its fee by mileage or another appropriate proxy.

adopt that rule, extending it to flat taxes on intrastate transactions would mark a dramatic departure from traditional taxing practices and would conflict with longstanding precedent. When Michigan's flat fee is analyzed under traditional fair apportionment and discrimination principles, it readily passes constitutional muster.

I. The Dormant Commerce Clause Does Not Proscribe All State Taxes That, If Applied By Every State, Would Burden Multi-State Companies More Than One-State Companies.

ATA contends that Michigan's fee is unconstitutional because, if every State imposed an identical fee, a company making intrastate deliveries in 48 States would pay $4800, while a company operating in only one State would pay $100. Why does that (hypothetical) cumulative burden violate the Commerce Clause? Relying on *Scheiner*, ATA asserts that "[t]he reason is obvious: unapportioned levies necessarily impose burdens on interstate commerce that are not borne by equivalent intrastate activity." ATA Br. 14. That begs the question, however. Why *shouldn't* companies that operate in multiple States (hereafter, "multi-state companies") bear burdens not borne by companies that operate in just one State (hereafter, "one-state companies")?

ATA separately argues that Michigan's flat fee is systemically biased against multi-state trucking companies because, on average, they use Michigan roads less for the purpose of conducting intrastate operations than do local trucking companies. ATA Br. 19-21. We respond to the allegation in §III, *infra*. What matters at present is that a finding of systemic bias against multi-state companies is not a predicate to application of ATA's $4800-versus-$100 test. Rather, ATA's test is premised on the view that the dormant Commerce Clause shields multi-state companies from state measures, whether viewed in isolation or in combination with other States' measures, that incidentally burden them more than

one-state companies. That premise is untenable, even as applied to taxes on interstate activities.

ATA's $4800-versus-$100 rule conflicts with the underpinnings of Our Federalism, general dormant Commerce Clause principles, and the Court's state-tax Commerce Clause jurisprudence. Subsections (A) and (B), *infra*, illustrate this by focusing on state regulations. Although state regulations affect multi-state companies in somewhat different ways than state taxes—for example, *inconsistent* state regulations often burden multi-state companies, while the internal consistency test hypothesizes *uniform* state taxes—examining the States' authority to regulate is still instructive, for it illustrates the extent to which ATA's internal consistency test departs from core constitutional precepts. Subsections (C) to (E), *infra*, return the focus to state taxes and demonstrate that ATA's proposed rule would depart from existing state-tax jurisprudence and would call into question the validity of numerous other state taxes. For these reasons, the Court should reject that rule.

A. Our Federalism embraces state laws that have the incidental effect of burdening multi-state companies more than one-state companies.

In his landmark opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199-200 (1824), Chief Justice Marshall suggested a "dual federalism" model of American government under which the state and federal governments each possessed distinct, mutually exclusive fields of power. Under that model, "the Constitution's textual grant of power to Congress would simultaneously deprive the states of any power to regulate interstate commerce." Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and The Constitutional Balance of Federalism*, 1987 Duke L.J. 569, 584 (1987). Dual federalism long ago ceased to be an "accepted theory of American federalism." *Id.* State power to enact measures affecting interstate commerce is now so well accepted that

"[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

The States' power to enact regulations and rules affecting interstate commerce inevitably imposes burdens on multi-state companies that are not imposed on one-state companies. To take an obvious example, if States adopted varying laws governing how a product must be labeled, the costs of manufacturing and distributing the product across the country would necessarily rise. These added costs would not be borne by a company that manufactured and distributed the product solely within one State. Countless other state laws—including common-law tort rules, common-law contract rules, health and safety regulations, and reporting requirements—have a similar consequence. It is beyond cavil, or should be at this point in our Nation's history, that the Constitution does not proscribe state and local laws merely for having that effect.

Many a multi-state company would prefer to deal with one, national set of rules and regulations than with 50 sets of rules and regulations. Yet, while this Court has pronounced the importance of having a "national market," *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994), it has never demanded complete national uniformity in commercial regulation. And rightly so. The Framers of our Constitution did not intend to create a purely national marketplace in which commercial entities do not have to worry about the economic consequences of choosing to engage in business in multiple States. As Professor Regan explained:

> Talk of economic nationhood and of a national common market tends to suggest that there is a national interest in uniformity of commercial regulation. But there is no such interest.... The reason for having separate states is to allow diversity—diversity

> of commercial regulation as much as diversity in other spheres. Of course, diversity has its costs, and Congress exists in part to see that the costs of diversity do not become intolerable. But the most fundamental features of our polity are inconsistent with the idea that we value uniformity of state regulation just for the sake of uniformity.

Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1177 (1986).

As it is, Our Federalism includes autonomous sovereign States entitled to enact diverse laws that serve the needs and interests of their citizenry and raise necessary revenues. See *Younger v. Harris*, 401 U.S. 37, 44-45 (1971) ("the entire country is made up of a Union of separate state governments, and . . . the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways"). Whether or not having States "perform their separate functions in their separate ways" is the most efficient form of government, it is, without question, *our* form of government.

B. General dormant Commerce Clause jurisprudence does not proscribe state regulations whenever they incidentally burden multi-state companies more than one-state companies.

The regulatory and taxing power of the sovereign States is not unlimited, of course, and the dormant Commerce Clause imposes necessary and proper limits thereupon. Those limits are fully consonant with the federalism principles discussed above. The core concern of the Commerce Clause's negative aspect is "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Oklahoma Tax Comm'n v. Jefferson*

Lines, Inc., 514 U.S. 175, 180 (1995). Current doctrine accomplishes that objective, with respect to state regulatory measures, through (1) a virtually *per se* rule against state laws that discriminate against interstate commerce, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997), and (2) a prohibition against state laws where "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Neither rule, as elucidated and refined in this Court's decisions, invalidates state laws merely for having the effect of burdening multi-state companies more than one-state companies.

Discrimination. This Court has rejected the notion that a state law discriminates within the meaning of the dormant Commerce Clause whenever the law's burden happens to fall principally on some multi-state companies. Rather, such concerns are properly analyzed under the *Pike* balancing test. For instance, in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), the Court rejected a dormant Commerce Clause challenge to a Minnesota law banning the retail sale of milk in plastic, non-returnable containers. The Court found that "Minnesota's statute does not effect 'simple protectionism,' but 'regulates evenhandedly.' . . . This statute is therefore unlike statutes discriminating against interstate commerce, which we have consistently struck down." 449 U.S. at 471-72. Later in the opinion, the Court addressed the contention that "the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry," but did so under the *Pike* balancing test. *Id.* at 473-74.

Likewise, in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), the Court upheld an Indiana statute that made it more difficult for hostile takeovers of Indiana corporations to succeed. The Court rejected respondent's claim that the statute "is

discriminatory because it will apply most often to out-of-state entities." 481 U.S. at 88.

> "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978); . . . . Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce.

Id. As in *Clover Leaf Creamery*, the Court then assessed the statute under the *Pike* balancing test.

Clearly excessive burden. In *Pike* itself, the Court held that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. The import of the test is plain on its face: a non-discriminatory state regulation burdening interstate commerce is ordinarily constitutional; only when that burden is "clearly excessive" will it violate the dormant Commerce Clause.

In practice, the *Pike* balancing test does not often invalidate state laws. *Clover Leaf* and *CTS Corp.*, discussed above, are just two of many instances in which this Court rejected a dormant Commerce Clause claim based on the *Pike* test. As Professor Tribe has observed, "[w]hen the Court has . . . applied its balancing test, weighing the burden on interstate commerce against the benefit to the state's legitimate interests, it has most often upheld the statute as one whose benefits outweigh its burdens." Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW §6-6, at 1062 (3d ed. 2000).

The result could not be otherwise. If an added burden on multi-state companies (greater than that borne by one-state companies) were enough to invalidate a state law under the dormant Commerce Clause, the preemption provisions of the Employee Retirement Income Security Act, 29 U.S.C. §1132(a), the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136v(b), and many other federal statutes would have been unnecessary because they were designed in large measure to replace diverse state laws with uniform national standards. Congress needed to intervene in these areas precisely because the dormant Commerce Clause did not bar the States' prior set of laws, which inevitably burdened multi-state companies more than one-state companies.

C. ATA's version of the internal consistency test finds no support in this Court's jurisprudence governing the dormant Commerce Clause's application to state taxes.

1. If (as we are assuming, *arguendo*) the Court concludes that Michigan's fee is a tax, then the argument above does not, of its own force, dispose of the question presented in this case. Because of the complexity of state tax codes and the complex ways by which companies are affected by multiple States' taxes, this Court has imposed various limits on state taxation that do not apply to state regulations. See generally Tribe, *supra*, §6-15, at 1105-06. The four-part test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), for assessing whether state taxes violate the dormant Commerce Clause does not, therefore, duplicate the discrimination and clearly excessive burden inquiries applicable to state regulations.

Nevertheless, the federalism principles discussed above apply with full force to state taxes. And the broad objective of the dormant Commerce Clause—avoiding economic Balkanization—is no different when state taxes are being considered. Cf. *Jefferson*

Lines, 514 U.S. at 179-80 (reciting general dormant Commerce Clause principles and then reviewing how the Court has applied those principles to state taxes). Accordingly, although multi-state companies cannot be taxed at higher rates than one-state companies and cannot be taxed on more than 100% of their net income, they can be forced to accept the inevitable consequence of operating in more than one State—having to bear the burden of complying with more than one State's laws, including tax laws.

The Court reaffirmed that fundamental principle in *Jefferson Lines*, when a bus service complained that it might have to pay a sales tax on tickets it had sold in Oklahoma for bus travel from Oklahoma to other States as well as, perhaps, a gross receipts tax levied by Texas on the Texas portion of a bus trip. Rejecting that argument, the Court stated:

> The multiple taxation placed upon interstate commerce by such a confluence of taxes is not a structural evil that flows from either tax individually, but it is rather the "accidental incident of interstate commerce being subject to two different taxing jurisdictions."

514 U.S. at 192 (quoting William-B. Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv. L. Rev. 40, 75 (1943), and citing *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 277 (1978)).

2. This does not mean, of course, that *all* forms of multiple taxation are constitutional. The Court's "fair apportionment" jurisprudence—the second prong of *Complete Auto*—is designed to distinguish valid types of multiple taxation from invalid ones. Fair apportionment works hand-in-hand with *Complete Auto*'s substantial nexus prong "to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989). The paradigmatic fair apportionment concern

is when taxation by more than one State results in an entity being taxed cumulatively on more than 100% of its net income. See *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). This concern with taxation by more than one State on the entirety of the same tax base prompted the Court to adopt its fair apportionment rule, which guards against that contingency (typically referred to as "multiple taxation"). *Jefferson Lines*, 514 U.S. at 184-85.

ATA's version of the internal consistency test does not advance the interest in fairly apportioning how a particular activity, or a company's net income, is taxed by multiple States. ATA's test instead guards multi-state companies against having to pay a tax in each State for activities that no other State could tax (such as the privilege of doing business in a particular State). Such taxes do not raise any apportionment concerns, *i.e.*, "ensur[ing] that each State taxes only its fair share of an interstate transaction," *Goldberg*, 488 U.S. at 260-61. Rather than ensuring that a State does not tax more than its fair share of an interstate activity, ATA's test insulates multi-state companies from paying taxes to which they are properly subject. This protection of multi-state companies from taxes imposed by the multiple States in which they operate is wholly disconnected from any genuine dormant Commerce Clause objective.

D. Practical consequences also counsel against ATA's version of the internal consistency test.

The consequence of applying ATA's internal consistency test would be to render numerous types of state taxes and fees, which have been enforced for years, vulnerable to constitutional challenge. That alone is cause to doubt whether the test reflects a proper construction of the dormant Commerce Clause. Cf. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)

("[The] matter . . . is disposed of . . . , on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax . . . . Upon this point a page of history is worth a volume of logic.").

ATA is not shy about the consequences of its position. It approvingly quotes Professor Hellerstein's opinion that "the imposition of *any* unapportioned flat state or local tax on a multistate business would appear to be vulnerable to attack under the 'internal consistency' doctrine." ATA Br. 15 (quoting Walter Hellerstein, *Is 'Internal Consistency' Foolish?: Reflections On An Emerging Commerce Clause Restraint On State Taxation*, 87 Mich. L. Rev. 138, 153-54 (1988)). Rather than serving as reason to mechanically invalidate Michigan's flat fee on intrastate commerce, this possible consequence of ATA's version of the internal consistency test counsels in favor of rejecting it.

Indeed, Professor Hellerstein himself observed that a broad application of the internal consistency test would have a great "impact on existing state tax structures," and that the implications of that impact would be "rather unsettling." Hellerstein, *supra*, 87 Mich. L. Rev. at 153-54. He listed three "broad categor[ies]" of taxes and fees placed in jeopardy by the internal consistency test (as construed by ATA) because they are "unapportioned flat taxes": (1) many "initial fees and taxes on domestic and foreign corporations when first organizing or qualifying to do business in the state"; (2) many "annual business license taxes imposed by states and localities for carrying on particular trades or occupations"; and (3) many "professional and similar licensing fees," such as bar fees imposed on those wanting to practice law in a certain State. *Id.* at 154-56.

ATA, in its petition for a writ of certiorari and brief on the merits, trumpets still more types of state taxes it believes are invalid under its position. See ATA Pet. 24-26 & nn.12-13; ATA Br. 15-16 n.6. These include flat fees on transporters of hazardous waste, fuel tax registration fees, fuel-user license fees, and fees used to support no-fault insurance funds.[2]

To be sure, if ATA were to prevail in this case, the state Attorneys General would vigorously defend the various flat taxes made vulnerable by ATA's position. Let there be no doubt, though, that ATA seeks to forge a path at the end of which is the demise of numerous and multifarious state taxes, many of longstanding pedigree. This Court should decline to embark on that journey.

E. This Court's Decisions Do Not Support ATA's Interpretation Of The Internal Consistency Test.

The above discussion shows that there is no justification for a rule that a state tax violates the dormant Commerce Clause merely because, if every other State enacted the same tax, multi-state companies would be burdened more than one-state companies. ATA insists, however, that the Court has already adopted that rule with respect to taxes on interstate transactions. That is not the case.

1. The Court memorably described its dormant Commerce Clause jurisprudence as a "quagmire," *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959), and the internal consistency test is emblematic. Putting *Scheiner* to the side for the moment, the Court appears to have adopted two

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[2] ATA even succeeded in convincing the Oregon Court of Appeals to invalidate an optional flat fee that truckers can choose to pay instead of a weight-mile tax. See *American Trucking Ass'ns, Inc. v. Oregon*, 90 P.3d 15 (Or. App. Ct. 2004), *rev. allowed*, 104 P.3d 601 (Or. 2004). Although the flat fee is optional, applies only where reporting and enforcement of the weight-mile tax would be onerous, and is designed to generate the same revenues as would have been generated if flat-fee taxpayers had paid the weight-mile tax, the court struck it down under ATA's expansive reading of the internal consistency test. *Id.* at 20-23.

internal consistency tests: a fair apportionment version that helps ensure that a State is not taxing more than its fair share of a taxable transaction; and a discrimination version that helps confirm the discriminatory impact of a facially-discriminatory tax. Neither version serves as a means of ferreting out taxes that, if applied in all 50 States, would merely result in multi-state companies paying more in taxes than one-state companies.

In *Container Corp.*, the Court stated that a "component" of fair apportionment "is what might be called internal consistency —that is, the [tax] formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed." 463 U.S. at 169. This was the first time the Court referenced internal consistency, but the test did not break new ground. It merely expressed the well-established fair apportionment rule prohibiting multiple taxation. See §I(C), *supra*.

In *Goldberg*, 488 U.S. at 261, and *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 379-80 (1991), the Court described the test in *Container Corp.*'s terms, *i.e.*, as a fair apportionment/multiple taxation test. The Court did so again when it most recently applied the internal consistency test, in *Jefferson Lines*, *supra*. Citing *Goldberg* and *Container Corp.*, the Court stated that "[a] failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from *the interstate transaction*." 514 U.S. at 185 (emphasis added). That phrasing envisions a discrete transaction, the taxation of which must be fairly apportioned among the States to eliminate the risk of multiple taxation.[3] The tax at issue in *Jefferson Lines*

[3] The Court cited *Gwin, White & Prince v. Henneford*, 305 U.S. 434, 439 (1939), a classic multiple taxation case in which the Court held that a Washington gross receipts tax was not fairly apportioned because it measured its tax "by the entire volume of the interstate commerce in which appellant participates" and therefore "is not apportioned to activities within the state."

satisfied the test because "[i]f every State were to a impose a tax identical to Oklahoma's, that is, a tax on ticket sales within the State for travel originating there, no sale would be subject to more than one State's tax." *Id.*

Shortly after its decision in *Container Corp.*, the Court applied the internal consistency test in a different way, namely, as a method of confirming the discriminatory impact of a facially discriminatory tax. In *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), the Court addressed a West Virginia tax that discriminated on its face by exempting in-state manufacturers from a wholesaling tax imposed on selling activities in the State. The State argued that Armco must "prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia." 467 U.S. at 644. The Court held that "[t]his is not the test." *Id.* After quoting the internal consistency test as set forth in *Container Corp.*, the Court stated:

> In that case, the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce. A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce. See also *id.*, at 170-171. Any other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated.

Id. at 644-45. In other words, a facially-discriminatory state tax cannot be saved by the possibility that other taxes will have an offsetting effect.[4]

The Court next applied the internal consistency test in *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987). As in *Armco*, the Court first concluded that the tax scheme at issue was facially discriminatory. 483 U.S. at 240. The Court then stated that, "[a]s we explained in *Armco*, our

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[4] Professor Hellerstein has observed that the West Virginia tax scheme at issue in *Armco* failed the internal consistency test because if all 50 States adopted West Virginia's scheme, a "wholly intrastate manufacturer/wholesaler would pay a tax only on its manufacturing activity" while "the enterprise that manufactured in one state and wholesaled in another would pay a manufacturing tax to the state of manufacture and a wholesaling tax to the state of sale." Hellerstein, *supra*, 87 Mich. L. Rev. at 142. It would be a serious mistake to extrapolate from that observation a general rule that the internal consistency test invalidates *any* state tax that, if adopted by all 50 States, would impose burdens on multi-state companies not borne by one-state companies. Beyond the fact that the Court in *Armco* did not purport to establish such a rule, it also misconstrues the constitutional problem with West Virginia's tax.

West Virginia taxed two discrete activities (tax bases), but relieved in-state manufacturers from one of those taxes. If every State adopted that tax scheme, companies that performed both activities in one State would be taxed on only one activity (wholesaling), whereas companies that operated in two States would pay taxes on both tax bases. This result discriminated against multi-state companies, which were taxed more than one-state companies on a particular tax base applicable to them both. By contrast, there is nothing discriminatory about a one-state company paying taxes with respect to one tax base (*e.g.*, retailing in the State), a two-state company paying taxes on two tax bases (*e.g.*, retailing in States A and B), a three-state company paying taxes on three tax bases (*e.g.*, retailing in States A, B, and C), and so on. A multi-state company is not discriminated against when it must pay taxes on additional tax bases because it engages in additional, taxed activities. The Court made precisely this point in the passage from *Jefferson Lines* quoted, *supra*, at 12.

conclusion that a tax facially discriminates against interstate commerce need not be confirmed by an examination of the tax burdens imposed by other States." *Id.* at 247. The Court then quoted the portion of *Armco* quoted above, without modifying the internal consistency test in any way. *Id.*

Thus, there appear to be two general internal consistency tests: the *Container Corp.* fair apportionment version and the *Armco* discrimination version. Neither version of the test would invalidate a non-discriminatory state tax imposed on a discrete activity that only one State could tax (such as the privilege of conducting business in a particular State). Nor does either version invalidate all state taxes that, if applied by every State, would result in multi-state companies being cumulatively taxed more than one-state companies. A facially-neutral tax whose structure ensures that a company will not be taxed on more than 100% of the taxed activity passes both versions of the internal consistency test.

2. *Scheiner*, decided the same day as *Tyler Pipe*, is the case upon which ATA principally relies. See ATA Br. 13-14. *Scheiner* addressed two Pennsylvania flat taxes on trucks engaged in interstate commerce, which were part of a complicated tax regime that varied over the years. The Court found two constitutional flaws with the taxes. First, the Court concluded that the taxes discriminated against out-of-state trucking companies. The State offset the flat taxes imposed on local truckers, but not out-of-state truckers, by reducing certain other fees paid only by local truckers, *Scheiner*, 483 U.S. at 273-75; and the taxes "impose[d] a cost per mile on [multi-state trucks] that is approximately five times as heavy as the cost per mile borne by local trucks," *id.* at 286.

Viewed this way, the Court's holding that Pennsylvania's flat tax failed the internal consistency test, *id.* at 284, can be seen as an application of the *Armco* anti-discrimination version of the test. The one paragraph in *Scheiner* addressing internal consistency did not

purport to modify or expand the test, and the only case it cited was *Armco* itself. *Id.* Just one Term later, in *United States v. Sperry Corp.*, 493 U.S. 52, 61 n.7 (1989), the Court described *Scheiner* in just this fashion:

> The flat taxes [in *Scheiner*] were objectionable because, even though they were facially neutral, their effect was to subject out-of-state vehicles, which traveled on average much fewer miles inside Pennsylvania than did in-state vehicles, to a much higher charge per mile traveled. The taxes failed what we have described as the "internal consistency" requirement of the Commerce Clause. [483 U.S.] at 282-287; see also *Tyler Pipe Industries*, [*supra*].

Second, the Court faulted the flat taxes for "placing a financial barrier around the State of Pennsylvania." *Scheiner*, 483 U.S. at 284. The Court's obvious concern was that the taxes penalized interstate commercial travel by taxing "the privilege of making commercial entrances into its territory." *Id.* By imposing the tax on all commercial entries into the State, including by trucks that did not even stop in the State (*e.g.*, trucks making shipments from New Jersey to Ohio via Pennsylvania), Pennsylvania was disrupting the flow of interstate commerce. That disruption would only be magnified if every State imposed a similar tax.

Addressing that concern does not require a rule that the dormant Commerce Clause proscribes all flat taxes or all taxes that, if adopted by all 50 States, would burden multi-state companies more than one-state companies. The Court did not remotely suggest it was adopting any such rule, and no such rule was needed to invalidate the taxes at issue. A non-discriminatory tax imposed on a discrete event does not "exert[] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure." *Id.* at 286. ATA's expansive version of the internal consistency test unmoors the test from its twin purposes of

barring multiple taxation and facially discriminatory taxes, and was not adopted in *Scheiner*.

Nor, finally, do the "drummer" cases cited by ATA (Br. 17-19) suggest that flat taxes on interstate transactions are unconstitutional. In those cases, the Court struck down flat taxes imposed by cities on salespeople who traveled for a company and used samples to solicit orders from customers for goods to be delivered to them at a later time. See *Nippert v. City of Richmond*, 327 U.S. 416 (1946); *Robbins v. Taxing Dist. of Shelby County*, 120 U.S. 489 (1887). *Robbins* rested on two grounds: the now-discredited view that "no regulations can be made [by States] directly affecting interstate commerce," 120 U.S. at 494, and the recognition that the tax was designed by local powers to discriminate against interstate commerce because only out-of-state companies needed to employ "drummers" to sell their goods, given that local companies could sell their wares to customers from local stores, *id.* at 498.

Nippert also emphasized the discriminatory nature and presumed discriminatory intent of the tax at issue. 327 U.S. at 429-34. And the *Nippert* Court found, after observing that "not all burdens on commerce, but only undue or discriminatory ones, are forbidden," *id.* at 425, that "the tax [was] not only burdensome but prohibitive," *id.* at 429. That reasoning is a far cry from ATA's broad position that the dormant Commerce Clause invalidates any state tax that has the effect of burdening multi-state companies more than one-state companies.

II. *Scheiner* Should Not Be Extended To Invalidate Flat Fees On Intrastate Commerce.

Whether or not *Scheiner* adopted ATA's version of the internal consistency test, its holding should not be extended to exactions on intrastate activities. The Court in *Scheiner* responded to special

concerns not presented by fees on intrastate activities, which are commonplace and (until now) of unquestioned validity; and ample precedent supports their constitutionality.

1. ATA is correct that the Commerce Clause no longer places a firewall between interstate activities (which the States could not tax) and intrastate activities (which the States could tax). ATA Br. 35-36. That does not mean, however, that the distinction between interstate and intrastate activities is irrelevant for all dormant Commerce Clause purposes. Indeed, drawing a line between those two types of activities makes perfect sense in terms of the objectives the dormant Commerce Clause is intended to serve.[5]

As discussed above, motivating the Court in *Scheiner* was the concern that Pennsylvania's flat taxes on the commercial use of its roads penalized interstate travel and stood as a barrier to entry into the State. See 483 U.S. at 284 (the tax's "inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania. . . . If each State imposed flat taxes for the privileges of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred."). A flat fee on an intrastate business transaction, such as Michigan's fee, does not raise that specter.

Commercial carriers are free to come and go into Michigan (or any other State that imposed a like fee) as they please. Trucks are

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[5] The line drawn above between interstate activities and intrastate activities conducted by multi-state companies is *not* the same as the line between activities that Congress may regulate under the Commerce Clause and activities that it may not. See generally *United States v. Lopez*, 514 U.S. 549 (1995). We are not suggesting that the regulation of intrastate trucking operations is outside of Congress's Commerce Clause powers. But just because the interstate trucking/intrastate trucking distinction may not determine Congress' power does not mean it is irrelevant to the dormant Commerce Clause inquiry.

not taxed upon the mere entrance into the State and they are not deterred from driving through the State. Only if the trucks deliver goods between two points within Michigan would they have to pay a fee. Such a fee, however, is no different than myriad other fees that States and local government routinely impose on local businesses to help defray the costs of regulating them.

For example, §4-5-010 of the Municipal Code of the City of Chicago lists 50 types of businesses that must pay annual (mostly flat) license fees. Among the covered businesses are ambulance operators, pet shops, day care centers, general contractors, retail food establishments, laundries, retail liquor stores, body piercing shops, and tobacco dealers. Companies that operate in more than one State undoubtedly engage in many of those business and are subject to the fees. ATA's $4800-versus-$100 rule would hold every single one of these fees—and the many thousands of similar fees imposed across the country—unconstitutional (or at least presumptively unconstitutional, pending a showing by the taxing entity that it is administratively impossible to apportion the taxes in any other way). That is certainly not the law today, and should not become the law through a decision by this Court.

The Commerce Clause's purpose is to protect interstate commerce by preventing the States from enacting protectionist laws that would disrupt the flow of interstate activities and lead to economic Balkanization. *Jefferson Lines*, 514 U.S. at 180. The Clause is not designed to stop States and cities from exercising their basic power to tax and regulate those—be they multi-state or one-state companies—engaging in intrastate commerce.

2. Ample precedent supports the States' authority to impose flat taxes on intrastate activities. A long line of cases starting with *Osborne v. Florida*, 164 U.S. 650, 655-56 (1897), expressly recognizes the right of States to impose flat taxes on intrastate activities engaged in by transportation companies and other

businesses. For example, in *Osborne*, the Court upheld a flat license tax on express companies as applied to companies undertaking both intrastate and interstate deliveries on the ground that the State could tax the intrastate activity. 164 U.S. at 653-54. Similarly, in *Bode v. Barrett*, 344 U.S. 583, 585 (1953), the Court upheld a flat tax on all vehicles using Illinois' highways on the theory that "each of the interstate carriers does an intrastate business as well," and "[n]o effort is made to show that . . . the tax is increased by reason of the interstate operations of any appellant."[6]

The most recent drummer case, *Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969), reached the same conclusion. In *Dunbar-Stanley*, the Court upheld an Alabama tax of $5 per week on each "transient or traveling photographer." The tax was challenged by a North Carolina photography company that took pictures at J.C. Penney stores in Alabama, developed the pictures in North Carolina, and then sent them to the Penney stores for delivery to the customers. 393 U.S. at 538-39. Relying on the *Nippert* line of cases, the company asserted that the Commere Clause prohibited the tax. This Court unanimously rejected that claim. The "issue," held the Court, "is whether the local activity which is made the nominal subject of the tax is such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it." *Id.* at 540 (internal citation and quotation marks omitted). Whereas the solicitation of orders within a state is essential to certain interstate commerce, the photographing

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[6] See also *City of Chicago v. Willett Co.*, 344 U.S. 574, 576-79 (1953); *Browning v. City of Waycross*, 233 U.S. 16, 22-23 (1914); *Armour Packing Co. v. Lacy*, 200 U.S. 226, 234 (1906); *Kehrer v. Stewart*, 197 U.S. 60, 67-68 (1905); *Pennsylvania R.R. Co. v. Knight*, 192 U.S. 21, 26-27 (1904); *Allen v. Pullman's Palace Car Co.*, 191 U.S. 171, 180-81 (1903); *Pullman Co. v. Adams*, 189 U.S. 420, 422 (1903).

of children in department stores "is an essentially local activity: the business of providing photographers' services." *Id.* at 541.

We do not doubt that those decisions were based in part on the pre-*Complete Auto* approach to state taxing authority. But they were also grounded on the understanding that the sovereign States and their political subdivisions are empowered to tax local activities and have substantial leeway in structuring those taxes—including using flat taxes. That tradition, which is fully in keeping with widely-accepted federalism principles and the objectives of the dormant Commerce Clause, deserves this Court's continued respect.

III. Michigan's Flat Fee Is Fairly Apportioned And Does Not Discriminate Against Interstate Commerce.

The parties do not dispute that multi-state trucking companies making deliveries between points within Michigan have a sufficient nexus with Michigan. Nor do they dispute that Michigan's $100 fee is fairly related to services Michigan provides to the companies. The question left is whether the fee satisfies the two remaining *Complete Auto* prongs, fair apportionment and nondiscrimination. Michigan's $100 annual fee does.

Fair Apportionment. As discussed in §I(C), *supra*, the fair apportionment inquiry is designed "to ensure that each State taxes only its fair share of an interstate transaction," *Goldberg*, 488 U.S. at 260-61, and to prevent States from cumulatively taxing more than 100% of an entity's net income. Michigan's fee does not pose a risk of either problem because there is no interstate transaction to apportion here. The entire activity being taxed occurs within Michigan and the trucks are properly taxed on 100% of that intrastate activity. No other State could subject ATA to a similar fee for making intrastate Michigan deliveries.

The Commerce Clause does not require perfect apportionment, *i.e.*, a tax obligation precisely in proportion to the business transacted in the State. In *Jefferson Lines*, the taxpayer sought perfect apportionment, asserting that "unlike the telephone communication tax at issue in *Goldberg*, Oklahoma could feasibly apportion its sales tax on the basis of mileage." 514 U.S. at 195. The Court rejected that argument:

> [A]lthough we agree that no comparable barriers exist here, we nonetheless reject the idea that a particular apportionment formula must be used simply because it would be possible to use it. We have never required that any particular apportionment formula or method be used, and when a State has chosen one, an objecting taxpayer has the burden to demonstrate by "'clear and cogent evidence,'" that "'the income attributed to the State is in fact out of all appropriate proportions to the business transacted . . . in that State, or has led to a grossly distorted result.'" *Container Corp.*, 463 U.S., at 170, quoting *Moorman Mfg. Co.*, 437 U.S., at 274 (internal quotation marks omitted; citations omitted).

Id.

Even if Michigan is technologically and administratively capable of apportioning its fee for intrastate trucking operations based on mileage (or some other appropriate proxy), the Constitution does not require it to undertake that laborious burden. Flat fees serve the major tax objectives of being not only easy to administer, but easy for taxpayers to comply with. See Michael J. Graetz & Deborah H. Schenk, FEDERAL INCOME TAXATION–PRINCIPLES AND POLICIES 30-35 (3d ed. 1995) (equity, efficiency, and simplicity are the core criteria for judging a tax system). Whether those particular policy goals are outweighed by competing policies is a matter that has been, and should continue to be, left to the States.

Discrimination. As an initial matter, ATA seems to concede that its discrimination argument rises or falls with its internal consistency argument. After stating that "[t]his case involves the second and third prongs of the *Complete Auto* standard, the requirements of apportionment and nondiscrimination," it continues: "Satisfaction of these requirements, in turn, may be determined by application of what the Court has termed the 'internal consistency test.'" ATA Br. 12. Because the internal consistency test does not bar Michigan's fee (for the reasons set forth in §§ I and II, *supra*), ATA's discrimination argument fails as well.

ATA's more particularized discrimination argument (Br. 19-21) fares no better, even if it has independent force. ATA asserts that Michigan's fee discriminates against interstate commerce because "[o]n average, a trucking company that confines its operations to intrastate travel will drive far more miles within the taxing state and will obtain a vastly greater benefit from its intrastate fee than will an otherwise identical company that travels both intra- and interstate." *Id.* at 20. ATA does not suggest that empirical evidence supports this assertion. Just the opposite. Because, in its view, the tax is discriminatory by its very nature, it has no burden of "show[ing] an actual adverse effect on interstate commerce." *Id.* at 29.

That argument is circular. ATA assumes the tax is discriminatory and then asserts that "'[o]nce a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." ATA Br. 28-29 (quoting *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 343 (1992)). With the exception of *Scheiner* and *Nippert*, all the cases cited in support of that proposition involved statutes that discriminated *on their face*. See *Camps Newfound*, 520 U.S. at 575-76 ("It is not necessary to look beyond the text of this statute to determine that it discriminates against interstate commerce."); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 (1996) ("There is no doubt that the

intangibles tax facially discriminates against interstate commerce."); *Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality*, 511 U.S. 93, 99 (1994) ("The surcharge subjects waste from other States to a fee almost three times greater than the . . . charge imposed on solid in-state waste."); *Chemical Waste Mgmt.*, 504 U.S. at 336 (addressing Alabama hazardous waste fee that did not apply to waste having a source in Alabama); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265 (1984) (addressing excise tax that exempted certain locally produced liquor). Michigan's flat fee on intrastate commerce, by contrast, does *not* discriminate against interstate commerce on its face. The same $100 charge is levied on all carriers.

Neither *Scheiner* nor *Nippert*, the other two cases relied on by ATA, supports its "because the tax is discriminatory we don't have to prove it's discriminatory" argument. In *Scheiner*, the Court had before it record evidence that "[o]n the average, the Pennsylvania-based vehicles subject to the flat taxes travel about five times as many miles on Pennsylvania roads as do the out-of-state vehicles; correspondingly, the cost per mile of each of the flat taxes is approximately five times as high for out-of-state vehicles as for local vehicles." 483 U.S. at 276. Such evidence of discriminatory effect is precisely what ATA says it need not present here.

Nippert is no more helpful to ATA. By the time the Court decided *Nippert*, it had years of experience assessing the validity of taxes on salesmen and was well aware of the "concrete fact[]," 327 U.S. at 431, that local companies were not similarly situated to out-of-state companies because they could sell their goods at local stores and avoid the tax, *id.* at 432. Moreover, the history of drummer taxes and local governments' creative attempts to circumvent this Court's rejection of them, suggested to the Court that discrimination against out-of-town companies was "the object of the local commercial influences which induce their adoption." *Id.*

at 434. ATA's bald assertion that Michigan's flat fee on intrastate deliveries has the same effect lacks that "concrete" grounding. ATA should have attempted to prove that assertion in the ordinary manner, namely, through the crucible of discovery and trial. Having failed to do so, its discrimination claim must fail.[7]

CONCLUSION

The judgment of the Michigan Court of Appeals should be affirmed.

Respectfully submitted,

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[7] As Michigan argues, it is far from clear that mileage is the appropriate yardstick for gauging whether multi-state trucking companies are paying a higher effective rate, on average, than local trucking companies. Participation in safety programs funded by the fees is just one of many other possible yardsticks. Because ATA did not develop a record on the discrimination issue, there is no need for the Court to address that question. Nor is there any need for the Court do decide how much of a discriminatory effect must be shown for a state tax to run afoul of the Commerce Clause.

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IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether Michigan's $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in the legal issue presented by this case: whether a flat-rate regulatory fee which is imposed on vehicles used in intrastate commerce is subject to invalidation under the negative Commerce Clause.

Petitioners urge the Court to treat Michigan's intrastate fee as a tax and to invalidate it under the test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Michigan's truck fee is not, however, a general revenue raising measure but a bona fide regulatory fee, which raises limited funds that are used to support the State's regulation of intrastate trucking. Beyond the fact that petitioners ignore the longstanding distinction between taxes and regulatory fees, adopting their position could usher in a wave of challenges to a wide variety of business, trade and professional licens-ing fees.

Subjecting Michigan's fee to scrutiny under the *Complete Auto* test is especially unwarranted because the economic burden of the fee is borne by in-state interests. Michigan firms engaging in interstate trucking must pay the same fee as out-of-state firms to use a truck in the intrastate market. Moreover, Michigan businesses and consumers that use intrastate trucking services ultimately bear the costs of the fee. These groups are presumed capable of protecting their interests in the State's political process. *Goldberg v. Sweet*, 488 U.S. 252 (1989).

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[1] The parties have consented to the filing of this brief *amicus curiae*; their letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

Because of the importance of the issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

1. Michigan's $100 fee on vehicles engaged in intrastate commerce does not violate the negative Commerce Clause. As the Michigan Court of Appeals recognized, the fee is not a tax but a regulatory fee which supports the State's regulation of intrastate trucking. The court thus held that the fee's validity under the Commerce Clause should be determined by applying the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), rather than the four-part test of *Complete Auto*.

This Court has long recognized a distinction between taxes that are "used for the purpose of raising revenue" and regulatory fees that are charged to recover the costs of regulatory supervision. *Atlantic and Pacific Tel. Co. v. Philadelphia*, 190 U.S. 160, 164-65 (1903). "A law exhibiting the intent to impose a compensatory fee for [the costs of regulatory supervision] is *prima facie* reasonable." *Great Northern Ry. Co. v. Washington*, 300 U.S. 154, 159-60 (1937). A regulatory fee violates the Commerce Clause only when it is "so unreasonable and disproportionate to the service as to impugn the good faith of the law." *Id.* at 160.

Michigan's intrastate vehicle fee is clearly a bona fide regulatory fee which is imposed to cover the costs of the State's regulation of intrastate trucking. Petitioners themselves acknowledge that the fee is used for this purpose. *See* Pet. Br. 3. Moreover, the small amount of money that the State obtains from the fee refutes any contention that it serves as a general revenue-raising measure. Rather, the fee supports a substantial program of regulation, which benefits not only Michigan's citizens but also petitioners' members.

2. The Court has never subjected bona fide regulatory fees to scrutiny under the *Complete Auto* test. Indeed, the traditional theory used to justify judicial intervention under the Commerce Clause—that local interests dominate the political process to favor themselves at the expense of out-of-state interests—does not hold true when evenhanded regulatory fees are at issue. The Court has explained that "[n]ondiscriminatory measures . . . are generally upheld, in spite of any adverse effects on interstate commerce, in part because [t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994) (int. quotations and citation omitted).

Petitioners rely extensively on *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987). In *Scheiner*, the record established that a disproportionate burden of the marker fee and axle tax was borne by out-of-state trucks. No such evidence exists here. Moreover, the Court subsequently explained that *Scheiner* was based on the recognition that "Pennsylvania's flat taxes burdened out-of-state truckers who would have difficulty effecting legislative change." *Goldberg v. Sweet*, 488 U.S. 252, 266 (1989).

Here, by contrast, Michigan firms that engage in interstate trucking must pay the same fee as out-of-state firms to use a truck in the intrastate market. Moreover, because Michigan's intrastate fee applies to the intrastate market, its cost is ultimately paid by the State's consumers and businesses who ship intrastate. These groups are capable of protecting their interests in keeping shipping costs down through the State's political process.

3. Petitioners' invocation of the *Complete Auto* test further demonstrates why the Court should reject its extension to regulatory fees. Petitioners claim that the regulatory fee is discriminatory because "[o]n average, a trucking company that confines its operations to intrastate travel will drive far

more miles within the taxing state and will obtain a vastly greater benefit from its intrastate fee than will an otherwise identical company that travels both intrastate and interstate." Pet. Br. 20. According to petitioners, a flat fee is "several times more valuable to a local business than to its out-of-state competitors" and therefore discriminates in violation of the Commerce Clause. *Id.*

This reasoning is flawed in several respects. As a general matter, its acceptance by the Court could require invalidation of the flat fees paid by members of licensed professions or trades who engage in their occupation in multiple States. Those who do so are undoubtedly aware that they will incur additional costs such as rent, advertising and travel costs. License fees are just another cost of doing business.

More specifically, petitioners' discrimination claim is insubstantial. Petitioners ignore that Michigan truckers who serve both the intrastate and interstate markets are subject to the same higher effective rate as their competitors who compete solely in the intrastate market. Moreover, trucking firms from neighboring States could well engage in more intrastate business and have a lower effective rate than their Michigan-based competitors.

Additionally, petitioner's cost-per-mile theory assumes without evidence that the vehicles used by intrastate and interstate companies have identical cargo-carrying capacities. But interstate carriers may well use larger trucks than their intrastate competitors and thus may carry more cargo and obtain more revenue per mile from intrastate trucking than do their solely intrastate competitors. Petitioners' theory thus requires too many speculative assumptions. Their failure to produce any evidence to substantiate their theory is fatal to their claim.

ARGUMENT

MICHIGAN'S $100 FEE ON VEHICLES ENGAGED IN INTRASTATE OPERATIONS DOES NOT VIOLATE THE COMMERCE CLAUSE

The threshold question in this case is the analytical framework to be applied to determine the constitutionality of Michigan's $100 fee on vehicles engaged in intrastate commerce. The Michigan Court of Appeals properly held that the $100 fee is a "regulatory fee" and not a tax. Consequently, it analyzed the fee under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), rather than the four-part test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), which applies to taxes. J.A. 98-102. Finding that the fee's effect "on interstate commerce is incidental and does not rise to the level of discrimination," and that the fee "serves a legitimate nondiscriminatory purpose [of] funding safety and related regulations," the court held that "the burden imposed on interstate commerce by the . . . fee is [not] clearly excessive in relation to Michigan's interest in regulating safety on its highways" and does not violate the Commerce Clause. *Id.* at 101-02. That holding is correct.

In petitioners' view, the fee is simply a tax in masquerade. *See* Pet. Br. 8. But repeatedly calling the fee a tax does not make it one. *Cf. City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 97 (1893) ("That . . . the [government] receives something which it may use as revenue, does not determine the character of the charge or make it a tax."). Contrary to the views of petitioners, *see* Pet. Br. 26 n.11, the Court's cases make clear that there is a difference between the two under the Commerce Clause. As explained below, a regulatory fee that is the same for both in-state and out-of-state vehicles and that is used for the limited purpose of supporting a regulatory program which benefits both in-state and out-of-state interests and not general revenue raising, does not raise the

same possibility of hidden discrimination against out-of-state interests.

The court of appeals therefore properly rejected petitioners' claim that the $100 fee violates the negative Commerce Clause. The court did not engage in a "manifest evasion of this Court's precedents," Pet. Br. 8, when it held that the fee's constitutionality should be evaluated under the *Pike* balancing test applicable to regulatory programs rather than the *Complete Auto* test governing taxes. As explained below, ample authority supports the view of the court of appeals that Michigan's fee is not a tax but a legitimate cost which is properly imposed on those who benefit from the existence of a regulatory program.

Moreover, the Court should reject petitioners' attempt to further expand the scope of the negative Commerce Clause to invalidate state regulation of purely intrastate commerce. Drawing the line at their challenge does not require the Court to engage in an exercise in metaphysics nor involve the "triumph of formalism over substance." Pet. Br. 32. Consistent with modern Commerce Clause doctrine, it recognizes that when the burden of state regulation falls on local interests, there is no justification for the Court to invoke the doctrine and strike down the statute. Rather, in such circumstances the state political process is the proper forum for resolving disputes over the appropriate level of regulation. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994). The judgment of the Michigan Court of Appeals should therefore be affirmed.

A. Michigan's Intrastate Vehicle Fee Is A Bona Fide Regulatory Fee And Not A Tax

1. The Court has long recognized a distinction between taxes that are used "for the purpose of raising revenue" and regulatory fees that are charged to recover the costs of regulatory supervision. *Atlantic and Pacific Tel. Co. v.*

Philadelphia, 190 U.S. 160, 164-65 (1903); *see also Western Union Tel. Co. v. Borough of New Hope*, 187 U.S. 419, 427 (1903) ("This license fee was not a tax on the property of the company, or on its transmission of messages, or on its receipts from such transmission, or on its occupation or business, but was a charge in the enforcement of local government supervision, and as such is not in itself obnoxious to the [Commerce Clause].").

The Court has explained that "[i]n the exercise of its police power the state may provide for the supervision and regulation of public utilities, such as railroads . . . and may exact the reasonable cost of such supervision and regulation from the utilities concerned." *Great Northern Ry. Co. v. Washington*, 300 U.S. 154, 159-60 (1937). Relatedly, the Court has observed that:

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.

National Cable Tel. Ass'n, Inc. v. United States, 415 U.S. 336, 340 (1974).

In *Great Northern Railway* the Court held that "[a] law exhibiting the intent to impose a compensatory fee for such a legitimate purpose [as the cost of regulation] is *prima facie* reasonable." 300 U.S. at 159-60. Only when "the exaction [is] so unreasonable and disproportionate to the service as to impugn the good faith of the law" is it invalid under the Commerce Clause. *Id.* *See also Bourjois, Inc. v. Chapman*,

301 U.S. 183, 187-88 (1937); *Interstate Towing Ass'n, Inc. v. City of Cincinnati*, 6 F.3d 1154, 1164 (6th Cir. 1993) ("Where a state or municipality exacts a fee for inspection of goods or equipment involved in interstate commerce, such assessments have only been found to interfere impermissibly with interstate commerce where excessive or where the locality has no defensible interest in such inspections."); *V-1 Oil Co. v. Utah Dep't of Pub. Safety*, 131 F.3d 1415 (10th Cir. 1997) (applying *Pike* to uphold an evenhanded inspection fee imposed on out-of-state facilities selling liquefied petroleum gas to Utah residents on ground that fee and inspection requirements were de minimis); *Frank & Son, Inc. v. Washington*, 966 P.2d 1232, 1240 (Wash. 1998) ("regulatory fee was not a tax subject to . . . apportionment"), *cert. denied*, 526 U.S. 1066 (1999).

Michigan's $100 per vehicle charge is clearly a bona fide regulatory fee which is designed to cover the costs of the State's regulation of intrastate vehicle operations. As petitioners acknowledge, "[p]roceeds from the fee are used primarily for the 'administration' of Michigan's law relating to the operation of motor carriers." Pet. Br. 3 (citing Mich. Comp. Laws § 478.2(1)). Indeed, in recent years, Michigan has collected less than $3.9 million from fees assessed in regulating intrastate trucking, some of which was attributable to the fee charged for a certificate of operating authority.[2] *See* Michigan Public Service Commission, *2004 Annual Report* 15; Michigan Public Service Commission, *2003 Annual Report* 10. The small amount of funds that Michigan collects from regulating intrastate trucking refutes any suggestion that the State's per-vehicle fee was enacted to

[2] An intrastate carrier must apply for and obtain an Intrastate Motor Carrier Certificate in order to engage in intrastate trucking. *See* Mich. Comp. Laws § 477.1. The $100 fee for this certificate has not been challenged by petitioners.

serve as a general revenue raising measure.[3] *See Ferndale Laboratories, Inc., v. Cavendish*, 79 F.3d 488, 494 (6th Cir. 1996) ("The modest amount of the fee, and the fact that it produces only about $100,000 per year for both new applications and renewals, convince us that the fee provision. . . is not designed as a revenue-raising measure; rather, it is a reasonable charge to cover administrative costs.").

Petitioners argue that beginning in 1995, Congress preempted "most state economic regulation of intrastate trucking operations" and faults Michigan because it "did not amend its motor carrier law or reduce the Michigan tax to reflect this change." Pet. Br. 3 n.2 (citing Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 601(a) (1), 108 Stat. 1605, codified at 49 U.S.C. § 14501(c)). The State, however, still engages in a substantial program of regulation which provides substantial benefits to petitioners.

For example, the State requires that a trucker apply for and obtain a certificate of authority to engage in intrastate operations. The trucker must "submit proof of commercial public liability/property damage . . . insurance of a minimum of $750,000 for general commodities, and $1,000,000 where hazardous materials will be transported." *2004 Annual Report*, at 15.[4] Moreover, "[a]pplications for both intrastate for-hire authority and the transfer of existing authority are subject to safety reviews for compliance by the proposed carrier," which "include a review of the carrier's safety policy, drug and alcohol testing policy, and driver qualifications files,"

[3] The record indicates that the total of all fees Michigan collects in regulating trucking "closely matche[s]" the State's regulatory costs. J.A. 28 (Affidavit of Thomas R. Lonergan, Director, Motor Carrier Regulation Division, Michigan Pub. Serv. Comm'n).

[4] Intrastate household goods carriers must also obtain "an additional commercial cargo policy sufficient to provide coverage of the items transported." *2004 Annual Report* at 15.

2003 Annual Report at 10-11, as well as "U.S.D.O.T. records regarding safety ratings" and state police "files regarding vehicle inspections, violations found and citations issued." J.A. 32-33 (Lonergan affidavit). Under Michigan law, notice of all applications for intrastate operating authority is published bi-weekly; other carriers have the right to challenge an application on insurance and safety grounds by filing a protest, thus triggering a hearing on the application. *See* Michigan Pub. Serv. Comm'n, *Michigan Motor Carrier Handbook* 6, 9 (2000).

Furthermore, Michigan continues to regulate the rates charged by intrastate movers of household goods, an area which Congress did not preempt. *See 2004 Annual Report* at 16; 49 U.S.C. § 14501(c)(2)(B). Finally, the State monitors carriers to ensure that they maintain the required insurance coverage and investigates numerous complaints, *see 2004 Annual Report* at 15, which can be filed by "any person, firm, corporation, association . . . [or] motor carrier." *Michigan Motor Carrier Handbook* at 11.

Not only does Michigan's regulation of intrastate trucking protect the public, it also provides substantial benefits to petitioners' members. First and foremost, it ensures that their competitors cannot reduce their cost structure and undercut them by failing to obtain or maintain the required insurance. To similar effect, by requiring compliance with safety standards applicable to both vehicles and drivers, the State's regulatory program further protects truckers from those competitors who would cut corners by failing to perform required vehicle maintenance, hire unqualified drivers, require their drivers to exceed hours of service limits, or fail to conduct mandatory drug and alcohol testing. *See* Mich. Admin. Code r. 460.18203(4) ("[T]he commission will consider and make findings regarding whether the grant of authority may endanger the ability of existing carriers to

provide adequate, economical, safe, and efficient service.").[5] Finally, intrastate truckers engaged in the transportation of household goods are prohibited from undercutting their competition by charging predatory rates. *See* Michigan Pub. Serv. Comm'n, *Michigan Household Goods Motor Carrier Handbook* 14 (1998). Thus, it is clear that petitioners' members obtain substantial benefits from Michigan's regulation of intrastate trucking apart from those received by the general public.[6] The fee clearly passes muster under *Great Northern Railway*. *See* 300 U.S. at 159-60.

B. State Regulatory Fees Are Not Subject To The *Complete Auto* Test

1. Notwithstanding that this Court has long distinguished between regulatory fees and taxes, petitioners charge the Michigan Court of Appeals with engaging in "a manifest evasion of this Court's precedents" when it held that the fee should be analyzed under the *Pike* balancing test rather than the *Complete Auto* standard. Pet. Br. 22. Petitioners' accusation is unproved.

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[5]A complaint can be either informal, which merely requires a letter, or formal, with the latter triggering the right to a hearing before the Commission. *Michigan Motor Carrier Handbook* at 11. "Complaints may involve operations without a certificate or proper insurance or matters involving safety of drivers or vehicles." *Id.*

In 2004, the Commission processed 42 complaints; it served 39 formal complaints and scheduled 39 administrative hearings. *See 2004 Annual Report* at 15-16. The Commission also scheduled 310 informal conferences. *See id.*

[6]In faulting the State for failing to reduce the fee following federal preemption of the State's authority to regulate intrastate rates (*see* Pet. Br. 3 n.2; *id.* at 27 n.12), petitioners ignore that the amount has not been raised since 1990. *See* Mich. Comp. Laws § 478.2 (Bender 2004) (editor's notes). Salaries and other expenses have likely risen due to increases in the cost of living during the period.

As an initial matter, *amici* note that this Court has never subjected a bona fide regulatory fee to scrutiny under the *Complete Auto* test. Nor should it start now. Indeed, adoption of petitioners' approach would usher in a wave of challenges to other regulatory fees such as those paid by doctors, lawyers, accountants and other professionals which are typically flat and unapportioned. There would also be numerous challenges to state licensing requirements that are imposed on most trades. *See* Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 156-57 (1988) (asserting that "the licensee carrying on his trade in more than one jurisdiction bears a greater financial burden than his intrastate competitor merely because he is engaged in interstate commerce with the consequent interference with free trade among the states").

Contrary to the views of petitioners, the economic reality of Michigan's vehicle fee refutes the notion that the fee acts as a trade barrier which impermissibly discriminates against interstate commerce. The fee's practical effect is fundamentally different than that of the flat taxes at issue in *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266 (1987). Neither *Scheiner* nor its underlying economic rationale supports extending its holding to invalidate Michigan's regulatory fee.

Most significantly, the traditional theory used to justify judicial intervention under the negative Commerce Clause—that local interests dominate the political process to favor themselves at the expense of out-of-state interests—does not hold true when even handed regulatory fees are at issue. As the Court has explained, "Nondiscriminatory measures, like the even handed tax at issue here, are generally upheld, in spite of any adverse effects on interstate commerce, in part because '[t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse.'" *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186,

200 (1994) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473, n.17 (1981)); *cf. Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978) (Deference to state safety regulations "derives in part from the assumption that where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations.").

The Pennsylvania flat taxes which *Scheiner* invalidated included a marker fee, which only out-of-state vehicles were required to pay, and a per-axle charge that was imposed on all trucks merely for using the State's roads. *See* 486 U.S. at 274-75. The taxes were not regulatory fees, but rather general revenue measures which raised substantial sums. *See id.* at 276 n.10 (axle tax raised $80.4 million in fiscal year 1983-84). Significantly, out-of-state trucks paid more than five times the amount of axle-tax revenue that Pennsylvania's trucks paid. *See id.* at 276 n.9. Moreover, a number of States had responded to the marker fee, which out-of-state trucks paid at five times the rate of in-state trucks, by enacting retaliatory measures. *See id.* at 285; *see also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577 (1997) ("Avoiding . . . economic Balkanization, and the retaliatory acts of other States that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence.") (internal quotations and citation omitted). Moreover, the State stipulated that the administrative cost of issuing the markers was $5 per truck, which was only one-fifth of the fee. *See Scheiner*, 483 U.S. at 274.

The *Scheiner* Court reasoned that the "practical effect" of the marker fee was "plainly discriminatory" because the tax "impose[s] a cost per mile on [out-of-state] trucks that is approximately five times as heavy as the cost per mile borne

by local trucks." 486 U.S. at 286. The Court therefore held that the tax violated the Commerce Clause because it impermissibly "favors in-state business over out-of-state business for no other reason than the location of its business." *Id.* As for the axle-tax, the Court reasoned that it had "a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate business to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.* at 286-87 (quoting U.S. Const., art. I, § 8, cl. 3).

Assuming there is a basis in the text of the Constitution for the Court to invalidate facially-neutral state taxes and fees because of the burdens they impose on interstate commerce, *but see, e.g., Tyler Pipe Industries, Inc. v. Washington Dept. of Rev.*, 483 U.S. 232, 254 (1987) (Scalia, J., dissenting); *Camps Newfound*, 520 U.S. at 610-20 (Thomas, J., dissenting), there was at least a plausible ground for *Scheiner*'s conclusion that the marker and axle taxes were motivated by economic protectionism and discriminated against interstate commerce. In stark contrast to this case, there was evidence in the record establishing that the effective marker tax rate was five times higher for out-of-state than for in-state trucks. *See* 483 U.S. at 276 n.9. Most significantly, the evidence in the record established that the overwhelming burden of the axle tax fell on out-of-state interests. *See id.* at 276 n.10. Moreover, because the taxes fell on trucks merely for traveling through the State, it is clear that those who bore the overwhelming burden of the tax lacked representation in the State's political process. Indeed, in-state interests were exempted from the State's marker fee. *See id.* at 275.

To be sure, *Scheiner* did not expressly rely on this rationale. The Court, however, subsequently explained that this reasoning underlaid the decision. *See Goldberg v. Sweet*, 488 U.S. 252, 266 (1989) (distinguishing *Scheiner* from state tax on interstate telecommunications services; "whereas Pennsylvania's flat taxes burdened out-of-state truckers who would have difficulty effecting legislative change, the economic burden of the Illinois . . . tax falls on the Illinois . . . consumer, the insider who presumably is able to complain about and change the tax through the Illinois political process").

Moreover, because the taxes were imposed on all out-of-state trucks merely for passing through the State, their ultimate incidence was not borne by other in-state interests. Thus, in *Scheiner* there were no "major in-state interests adversely affected by the [taxes who could act as] a powerful safeguard against legislative abuse." *Clover Leaf Creamery Co.*, 449 U.S. at 473 n.17.

Michigan's regulatory fee is fundamentally different from the taxes at issue in *Scheiner*. First, in contrast to the marker fee at issue in *Scheiner*, the Michigan fee applies to vehicles without regard to their state of registration. Michigan-based truckers are required to pay the same fee to register their trucks as are out-of-state firms. And Michigan-based firms that engage in interstate trucking must also pay the fee to use a truck in intrastate trucking. Thus, there exist "major in-state interests adversely affected" by the fee who have the same interest as petitioners do in protecting against burdensome regulation. *West Lynn Creamery*, 512 U.S. at 200.

Second, consistent with the statute's purpose of funding the State's regulatory program (and in contrast to the axle tax at issue in *Scheiner*), the State receives only modest proceeds from the fee. *See* J.A. 24 (Lonergan affidavit) (in 1994, $2.9 million collected from intrastate vehicle decal fees), *2004 Annual Report* at 15; *2003 Annual Report* at 10; Mich. Comp. Laws § 478.6. Third, the fee has not been raised since 1990. *See* Mich. Comp. Laws § 478.2 (editor's notes) (Bender 2004). The latter two factors testify to the effectiveness of in-state interests in protecting against the enactment of unduly burdensome regulations. *See West Lynn Creamery*, 512 U.S. at 200; *see also Clover Leaf Creamery*, 449 U.S. at 473 n.17.

Finally, in contrast to *Scheiner*, where out-of-state interests bore the overwhelming burden of the taxes, *see* 483 U.S. at 276 n.9, there is no evidence that Michigan's fee results in out-of-state interests bearing the brunt of the costs of Michigan's program.[7]

Thus, there is no basis for accepting petitioners' unstated premise—that Michigan's in-state trucking interests acquiesced in the fee because it would give them a competitive advantage over their out-of-state competitors in the intrastate trucking business. Indeed, were it true that Michigan's fee imposed an undue burden on interstate commerce, that burden would ultimately manifest itself in two ways, both of which would impact Michigan's consumers and businesses who use intrastate trucking services and would be subject to correction in the State's political process.

First, truckers participating in Michigan's intrastate market would pass the cost on by charging higher prices.

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[7] Petitioners also rely on *Nippert v. City of Richmond*, 327 U.S. 416 (1946), which invalidated a municipal license tax on interstate commerce. But the tax was just that—a revenue-raising measure—and was not defended as a regulatory fee. While the tax had a flat-rate component, it was also based on the previous year's gross receipts. *See id.* at 418 & n.2 (citing Richmond City Code, ch. 10, § 23). The Court further explained:

> [W]e cannot be unmindful, as our predecessors were not when they struck down the drummer taxes, that these ordinances lend themselves peculiarly to creating those very consequences [of discriminating against interstate commerce and favoring local business] or that in fact this is often if not always the object of the local commercial influences which induce their adoption. Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against.

Id. at 434. As explained herein at pp. 15-18, no such argument can be made with respect to Michigan's regulatory fee.

Those prices would be paid by Michigan's consumers and businesses.

Second, some firms might decline to participate in the intrastate market thereby resulting in less competition in that market. The consequence of less competition in the intrastate market would also be higher prices for the numerous Michigan consumers and businesses who ship intrastate.

As a result, the interests of out-of-state truckers are not only aligned with those of Michigan's interstate truckers, but also with those of the State's consumers and businesses who ship intrastate and are capable of protecting their interests in obtaining lower prices in the State's political process. *See Goldberg*, 488 U.S. at 266. This is thus a far different situation than *Scheiner* because there is no basis for concluding that the State's political process was motivated by economic protectionism in enacting the intrastate fee.

Indeed, even if Michigan's regulatory fees were excessive, because those fees apply to an intrastate market and the costs they impose are ultimately paid—either directly or indirectly—by the State's own residents and businesses, the Court has no reason for intervening, let alone for applying the *Complete Auto* test to Michigan's regulatory fee. *See Scheiner*, 483 U.S. at 303 (O'Connor, J., dissenting, joined by Rehnquist, C.J. & Powell, J.) ("Creating an 'internal consistency' rule of general application is an entirely novel enterprise that the Court undertakes for the first time in this case. Yet the Court gives no reason why such a rule is necessary or desirable . . . .").[8]

The purpose of the negative Commerce Clause is not to protect Michigan's consumers and businesses from the costs

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[8] *See also Tyler Pipe*, 483 U.S. at 254 (Scalia, J., joined by Rehnquist, C.J., concurring in part and dissenting in part) (The "internal consistency principle is nowhere to be found in the Constitution. Nor is it plainly required by our prior decisions.").

of over-regulation even if that was truly at work here. *See Goldberg*, 488 U.S. at 266. Under these circumstances, there is no basis for inferring discrimination merely because some out-of-state interests may not obtain the same cost per mile as do some in-state interests. Indeed, because Michigan firms that engage in interstate trucking would also pay a higher cost per mile to truck intrastate than would a Michigan firm that engages only in intrastate trucking, petitioners' position rests on the implausible premise that Michigan's intrastate firms are more politically powerful than the combination of the State's own interstate truckers and those businesses and consumers that use intrastate truckers. This "practical effect" (*Scheiner*, 486 U.S. at 286) likewise counsels against judicial invalidation of the fee.

2. Petitioners' application of the *Complete Auto* test further demonstrates why the Court should reject its extension to regulatory fees. Asserting that the discriminatory effect of Michigan's fee "is undeniable," petitioners contend that "[o]n average, a trucking company that confines its operations to intrastate travel will drive far more miles within the taxing state and will obtain a vastly greater benefit from its intrastate fee than will an otherwise identical company that travels both intrastate and interstate." Pet. Br. 20. According to petitioners, "[s]uch a local company therefore will pay the tax at a lower effective rate than does its interstate competitor." *Id.* Invoking *Scheiner*, petitioners argue that "'imposition of [a] flat tax[] for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause.'" *Id.* (quoting 483 U.S. at 296).

Petitioners' reasoning is flawed in numerous respects. As a general matter, acceptance of the rationale that flat fees are discriminatory because they impose a higher effective rate on out-of-state licensees (as well as on in-state licensees who engage in regulated busineses, trades or professions in

multiple States) than on in-state licensees, would require invalidation of the flat fees which licensed professionals and tradesmen are required to pay to engage in their occupations in multiple States. This begs the questions of why it is a Commerce Clause problem and why a State must apportion a fee because a licensee makes the voluntary choice to practice a profession or trade in multiple States. Undoubtedly, those doing so might incur additional costs such as rent, advertising expense and fuel/travel costs. License fees are just another cost of doing business, which must be considered in deciding whether to engage in regulated activity in multiple States.

More specifically, petitioners' assertion that Michigan's fee is discriminatory is insubstantial. First, as explained above, petitioners ignore that Michigan truckers who participate in both the intrastate and interstate markets are subject to the same higher effective rate as their competitors who compete solely in the intrastate market. Second, Michigan is bordered by several States; a number of major industrial centers are only a short drive away. Trucking firms from northern Ohio, Indiana and Illinois could well engage in more intrastate business and have a lower effective rate than their Michigan-based competitors.

Finally, even if it is true that in-state trucks have a lower cost per-mile than do interstate trucks, that by itself does not establish that the fee imposes an undue burden on interstate commerce. In contrast to *Scheiner*, there is no evidence in this case that the burden of Michigan's regulatory fee falls disproportionately on interstate commerce. Indeed, petitioners' cost-per-mile rationale is not a valid method for proving whether the fee has a discriminatory effect because it assumes—without evidence—that the vehicles used by intrastate and interstate companies have identical cargo-carrying capacities. Absent such evidence, petitioners' contention that a company engaged in intrastate trucking "obtain[s] a vastly greater benefit from its intrastate fee" than does a company

that engages in both interstate and intrastate commerce, Pet. Br. 20, is simply speculation. *Cf. Brown-Forman Distillers v. New York State Liquor Auth.*, 476 U.S. 573, 586 (1986) (Steven, J., dissenting) ("Speculation about hypothetical cases illuminates the discussion in a classroom, but it is evidence and historical fact that provide the most illumination in a courtroom.").

Michigan's fee applies to any commercial vehicle (or combination) without regard to its weight or size. Interstate truckers, however, typically use trucks with large cargo-capacities. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 665 (1981) (plurality op.). Again, there is no evidence in this record establishing that the vehicles used solely in Michigan's intrastate market are identical in size to those used by firms engaged in interstate trucking. By using large trucks, interstate carriers can carry more cargo and obtain more revenue per mile from engaging in intrastate trucking than do their solely intrastate competitors that use smaller vehicles. Thus, petitioners' theory that the regulatory fee discriminates because Michigan firms obtain "a privilege that is inherently more valuable to the local company" than it is to the interstate company, Pet. Br. 16, does not establish that the fee imposes an undue burden on interstate commerce.[9]

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[9]While some of this Court's cases have not required a party bringing a Commerce Clause challenge to present empirical evidence in support of the claim, petitioners' position requires the acceptance of several speculative assumptions. *Amici* respectfully suggest that petitioners have declined to present empirical evidence supporting their claim for good reason: the fee does not discriminate against or impose an undue burden on interstate commerce.

Petitioners further contend that "[t]he extent of the discrimination is immaterial" because "the Court 'has never recognized a "de minimis" defense to a charge of discriminatory taxation under the Commerce Clause.'" Pet. Br. 29 (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 n.3 (1996)). It would, however, be illogical for a doctrine that examines undue burdens on interstate commerce not to be subject to a de minimis defense.

Petitioner's claim is further refuted by Michigan law, which allows truckers faced with "unusual temporary demand" or an equipment "breakdown" to obtain pre-numbered 72-hour permits authorizing a vehicle's use in intrastate movements for the nominal fee of $10 per permit. *See* Mich. Admin. Code r. 460.18412; *see also Michigan Motor Carrier Handbook* at 9. More than 4,900 of these permits were issued in 2004. *See 2004 Annual Report* at 15.

This provision clearly benefits firms engaged in interstate trucking. An interstate carrier (whether from Michigan or another State) that needs more "temporary extra equipment for a greater volume of business than was anticipated" can divert one of its interstate trucks and need not pay the full

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Moreover, the proposition relied upon by petitioners derives from cases involving facially discriminatory taxes. *See Fulton*, 516 U.S. at 333. The two cases *Fulton* cited for this proposition also involved facially discriminatory tax schemes. *See Associated Industries of Mo. v. Lohman*, 511 U.S. 641, 654 (1994) (rejecting claim that use tax was "facially invalid in every jurisdiction"); *Maryland v. Louisiana*, 451 U.S. 725, 756-57 (1981) (discussing various tax credits and exemption which only in-State interests could claim). Likewise, *Associated Industries* cited *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992), in support of the proposition that "the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred." 511 U.S. at 650. But the statute at issue in *Wyoming v. Oklahoma* "expressly reserve[d] a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other States." 502 U.S. at 455. The provision thus discriminated on its face. *See id.* *Associated Industries* further cited *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988), which also involved a statute that discriminated on its face. *See* 511 U.S. at 650; *New Energy*, 486 U.S. at 274 ("The Ohio provision at issue here explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face appears to violate the cardinal requirement of nondiscrimination.").

annual fee to use the vehicle in the intrastate market. *Michigan Motor Carrier Handbook* at 9. Moreover, the Commission has never "undertaken any complaint or other enforcement action relating to second guessing or challenging the vehicle fees paid by a carrier utilizing each carrier's own judgment as to the portion of its fleet to be used for intrastate operations . . . based upon its own business circumstances." J.A. 23 (affidavit of Thomas R. Lonergan, Director Motor Carrier Regulation Division, Mich. Pub. Serv. Comm'n). The availability of these 72-hour permits—which petitioners do not even acknowledge[10]—further rebuts petitioners' conten-

[10] In their statement, petitioners illustrate the functioning of the Michigan fee with what they describe as "a realistic example":

> To illustrate the operation of the Michigan tax, consider the example of a truck that accrues virtually all of its annual mileage traveling interstate, but makes a single intrastate delivery while passing through Michigan by hauling a load between two points in the State. *That truck is obligated to pay the full $ 100 Michigan tax.* At the same time, an identical truck that travels the same number of annual miles but confines its operations to Michigan, conducting hundreds of trips within the State during the course of the year will pay the same $100 tax. The only way for the interstate truck to avoid payment of the Michigan tax would be for it to forgo intrastate business while it is passing through Michigan.

Pet. Br. 3-4 & n.3 (emphasis added & footnote omitted).

Petitioners' hypothetical does not completely describe the statute's operation. Assuming that the carrier has a valid operating certificate (a requirement which petitioners do not challenge) and has at least one truck registered for intrastate use, a carrier faced with "unusual temporary demand" can use a 72-hour permit (which can be obtained in advance) which allows an additional truck to be used in intrastate carriage for the nominal fee of $10. *See* Mich. Comp. Laws § 478.2(3). Thus, a truck need not necessarily forgo intrastate business nor pay the $100 fee to engage in "a single intrastate delivery." Pet. Br. 3. Indeed, as long as hours of service rules are complied with, *see* 49 C.F.R. Pt. 395, a truck might be used to make multiple intrastate deliveries within a 72- hour period.

tion that Michigan is engaged in economic protectionism of in-state interests.

C. Michigan's Intrastate Vehicle Fee Does Not Violate The Commerce Clause

As demonstrated above, there is no basis for applying the *Complete Auto* test to Michigan's even handed regulatory fee and calling into question scores of similar fees throughout the nation. Petitioners have failed to produce any evidence establishing that the fee is motivated by economic protectionism. Indeed, given the existence of substantial in-state groups who share the same interest as petitioners, petitioners are mistaken in suggesting that this Court rather than the state political process is the appropriate forum for resolving their claim that the fee is unduly burdensome. Whether the validity of the fee is assessed under *Pike* or *Great Northern Railway*, *see* pp. 7-11 *supra*, it is clear that Michigan's intrastate vehicle fee does not violate the negative Commerce Clause.

CONCLUSION

The judgment of the Michigan Court of Appeals should be affirmed.

Respectfully submitted,

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